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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1979

No. 79-1352

HART BOOKS STORES, INC., et al.,

Petitioners,

v.

RUFUS EDMISTEN, et al.,

Respondents.

* *

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

* *

PETITION FOR WRIT OF CERTIORARI

* *

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Petitioners Hart Book Stores, Inc.; Raleigh Books, Inc.; Tri-State News, Inc.; Jessie F. Frye, Jr., d/b/a L & J Newsstand; Thomas Page, d/b/a Player's Bookstore; Joseph Raymond McBroom, d/b/a M Distributors; Larry Gene Moore, d/b/a E. & M. EnterPrises; Camera's Eye, Inc.; and Mind's Eye, Inc., d/b/a Mind's Eye and Imperial Bookstore respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in this proceeding December 4, 1979, and

on which a rehearing was denied on January 10, 1980.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at F.2d , reh. den., and is reproduced as Appendix A-1, with the Order denying rehearing reproduced as Appendix A-2.

The opinion of the United States District Court for the Eastern District of North Carolina is reported as 450 F.Supp. 904 (E.D.N.C. 1978) and is reprinted as Appendix C.

The opinion of the United States District Court for the Western District of North Carolina is unreported. The Court's Memorandum of Decision and Findings of Fact and Conclusions of Law are reprinted as Appendix B.

JURISDICTION.

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on December 4, 1979. A petition for rehearing was denied by Order entered January 10, 1980. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and 28 U.S.C. §2101 (c).

QUESTIONS PRESENTED.

I. Do the North Carolina State Statutes which prohibit the simultaneous sale of predominantly sexually oriented publications and the exhibition of

predominantly sexually oriented motion picture films in the same building, premises or structure violate the First and Fourteenth Amendments to the United States Constitution because they deprive such stores, their customers, and those producing sexually oriented materials freedom of speech and freedom of the press in violation of the First and Fourteenth Amendments to the United States Constitution and also deprive them of other Constitutional rights as the price for exercising First Amendment rights?

II. Is the statutory scheme unconstitutional because it deprives the bookstores of Equal Protection of the laws in violation of the Fourteenth Amendment to the United States Constitution?

III. Is the statutory scheme unconstitutionally vague in violation of the First and Fourteenth Amendments to the United States Constitution because it proscribes the simulataneous sale of sexually oriented books and the exhibition of sexually oriented movies in the same "building, premises, structure or other facility . . ." based on whether or not most of the constitutionally protected material is "distinguished or characterized by an emphasis on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas. . ."?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Constitution of the United States:

AMENDMENT I.

> Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

North Carolina General Statutes §§14-202.10 through 14-202.12 (cum. supp. 1979):

§14-202.10. Definitions. As used in this Article:

(1) "Adult bookstore" means a bookstore having as a preponderance of its publications books, magazines, and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas, as defined in this section.

(2) "Adult establishment" means an

adult bookstore, adult motion picture theater, adult mini motion picture theater, or a massage business as defined in this section.

(3) "Adult motion picture theater" means an enclosed building with a capacity of 50 or more persons used for presenting motion pictures, a preponderance of which are distinguished or characterized by an emphasis on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas, as defined in this section, for observation by patrons therein.

(4) "Adult mini motion picture theater" means an enclosed building with a capacity for less than 50 persons used for presenting motion pictures, a preponderance of which are distinguished or characterized by an emphasis on matter depicting, describing,, or relating to specified sexual activities or specified anatomical areas, as defined in this section, for observation by patrons therein.

(5) "Massage" means the manipulation of body muscle or tissue by rubbing, stroking, kneading, or tapping, by hand or mechanical device.

(6) "Massage business" means any establishment or business wherein massage is practiced, including establishments commonly known as health clubs, physical culture studios, massage studios, or massage parlors.

(7) "Sexually oriented devices" means without limitation any artificial or simu-

lated specified anatomical area or other device or paraphenalia that is designed in whole or part for specified sexual activities.

(8) "Specified anatomical areas" means:
a. Less than completely and opaquely covered: (i) human genitals, pubic region, (ii) buttock, or (iii) female breast below a point immediately above the top of the areola; or
b. Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

(9) "Specified sexual activities" means
a. Human genitals in a state of sexual stimulation or arousal;
b. Acts of human masturbation, sexual intercourse or sodomy; or
c. Fondling or other erotic touchings of human genitals, pubic regions, buttocks or female breasts.

§14-202.11. Restrictions as to adult establishments. No building, premises, structure, or other facility that contains any adult establishment shall contain any other kind of adult establishment. No building, premises, structure or other facility in which sexually oriented devices are sold, distributed, exhibited, or contained shall contain any adult establishment.

§14-202.12. Violations; penalties. Any person who violates G.S. 14-202.11 shall be guilty of a misdemeanor and shall be imprisoned for a term not to exceed three months or fined an amount not to exceed three

hundred dollars ($300.00), or both, in the discretion of the court. Any person who has been previously convicted of a violation of G.S. 14-202.11, upon conviction for a second or subsequent violation of G.S. 14-202.11, shall be guilty of a misdemeanor and shall be imprisoned for a term not to exceed six months or fined an amount not to exceed five hundred dollars ($500.00), or both, in the discretion of the court.

STATEMENT OF THE CASE.

On January 1, 1978, the North Carolina statutory provisions quoted above became effective. These statutory provisions, by their essential terms, prohibit constitutionally protected, non-obscene, sexually oriented literature from being made available to the public in the same store where constitutionally protected, non-obscene, sexually oriented movies are offered for public viewing, if a "preponderance" of the literature and the movies emphasize, depict, describe, or relate to proscribed sexual content.

These cases were brought by a number of bookstores in the District Courts for the Eastern and Western Districts of North Carolina to challenge the constitutionality of North Carolina General Statute §14-202.10, et seq. Both District Courts found the statutes unconstitutional. Their decisions were reversed on consolidated appeal by the Fourth Circuit. The bookstores now ask this Court to review that decision by the Fourth Circuit.

The jist of the statutory provisions is

that the constitutionally protected dissemination of printed matter and movie pictures previously carried on in one building, under one roof, may no longer be carried on in the same building. Nor may a bookstore selling a "preponderance" of adult publications or showing a "preponderance" of adult movies sell any sexual devices -- including contraceptives. The statute permits, however, the very same activities it condemns in an adult business to be carried on in a building next door -- provided the business next door is engaging in only a single constitutionally protected activity. This statutory scheme, as the respondents have conceded throughout this litigation, is not aimed at obscenity as defined by this Court in Miller v. California, 413 U.S. 15 (1973).

The facts before both District Courts clearly established that the petitioner's establishments were targets of the statute and were threatened with imminent prosecution. (A. 47, A56, A65). Both District Courts and the United States Court of Appeals for the Fourth Circuit therefore reached the merits of the bookstores' claims.

The District Court for the Eastern District of North Carolina found certain facts. It found that at the time of the complaint the bookstores all operated businesses which primarily sold sexually oriented books and primarily exhibited sexually oriented motion picture film and which also sold contraceptive devices and that these activities all took place under the same roof. (A. 65). The bookstores' customers were required to verify their ages before being permitted to enter except in Raleigh Books where a front section of the bookstore selling books, magazines and newspapers

from major publishers was open to the general public and a back section selling sexually oriented material was restricted to adults. (A. 65).

The Eastern District also found that, after the statute became effective and in order to avoid prosecution, Hart Books, Tri-State, Raleigh Books and Frye all acquired enough non-sexually oriented books to outnumber their sexually oriented books. All of them abandoned the sale of sexually oriented devices, which in Raleigh Books and Tri-State News, Inc. included the sale of prophylactics. (A. 66). The Court further found that the bookstores objected to carrying (as over one-half of their publication inventory) non-sexually oriented books. "This necessity [of maintaining a 51% non-sexually oriented inventory] has restricted their ability to sell and display sexually oriented publications since much of theirspace is now devoted to non-sexually oriented books." (A. 66).

The Eastern District also found that Raleigh Books had always sold ordinary paperback books and magazines of the sort available on any newsstand. The District Court found as a fact that with the passage of the statute Raleigh Books had to try to avoid paperback books from major publishers which might be said to emphasize sexual matters. While it carried some books in that category, it had to avoid carrying too many for fear of "tipping" its inventory. The Court found that the corporation was concerned that its scrutiny of these books might not be completely successful and that it might be prosecuted in any case. It found as a fact that the corporation would like to be able

to carry books from major publishers without worrying about whether or not the books emphasize sexual matters. (A. 66-A67). The Court found as a fact that when Hart's Book Store purchased non-sexually oriented books in order to comply with the statute it had to avoid the book Fanny Hill and similar books which emphasize sexual matters. (A. 66).

The Court found the effect of the statute (so long as the bookstores exhibited primarily sexually oriented films) was to require them to carry certain categories of books, and to refrain from carrying others, at least in certain numbers, as a condition of being permitted to sell sexually oriented books which were protected by the First Amendment. (A. 67).

The Eastern District found the State's proposed justification for the statute unpersuasive. It found as a fact that the bill's sponsor had heralded the bill as one which would raise the overhead of adult bookstores and drive them out of business, but it found that such a State interest could not justify the statute (A. 61, A63, A68). The Court further found nothing to justify an assumption that the quality of life would be in any way improved by the separation of functions required by the statute. And it found that, if the statute were aimed at sexual conduct, regulation of sexual conduct could be more narrowly achieved without interference with First Amendment Rights. (A. 63-A64, A68-A69).

In its decision the Eastern District

found that the statute resulted in a substantial infringement of First Amendment rights and that it was incumbent upon the defendants to establish a compelling justification. (A. 59). Finally the Court concluded "the statute only suggests an increase in the number of outlets, at some expense to First Amendment freedoms, and in furtherance of no permissible State purpose. Thus, the Court is unable to conclude that the purported justification is sufficiently substantial to outweigh First Amendment rights involved." (A. 63).

Facts found by the United States District Court for the Western District of North Carolina were similar, but not identical. The Western District found as a fact that the reduction of availability of sexually oriented material may well occur as a result of the statute. (A. 48). It also found there was nothing before the Court to justify the conclusion that the quality of life would be appreciably improved by the regulatory scheme established by the statute. (A. 48). It also found the following significant facts:

> The statute represents a substantial burden on the plaintiffs' First Amendment rights; it substantially increases the overhead costs of their stores; it interferes with the plaintiffs' rights to choose the types of material protected by the First Amendment which they will carry and sell or exhibit in their stores; it cannot be justified as a "zoning ordinance" or an "innovative land use regulation", since it does not in any way affect the location or concentration

of the stores selling sexually oriented material."

(A. 48-A49).

On consolidated appeals, the Fourth Circuit (contrary to findings of fact below) concluded that the effect of the statute on the availability of sexually oriented books would be minimal since several plaintiffs below had opted for compliance. However, as Judge Dupree's findings of fact show, the stores which complied had to raise their publication inventories of non-sexually oriented books to at least 51%, necessarily restricting the variety and number of sexually oriented publications which they carried and which were available to their patrons by slightly more than half. As a result patrons' access to sexually oriented books was dramatically reduced. This is so because bookstores have only a finite amount of space in which to sell and display books.

In sum, Judge Franklin T. Dupree, sitting in the Eastern District, held the statutory scheme to be in violation of the bookstores' First Amendment rights and also to violate equal protection guarantees under the Fourteenth Amendment. Judge James B. McMillan in the Western District concluded that the state act violated First, Ninth, and Fourteenth Amendment guarantees of freedom of speech, privacy, and equal protection, and that the law was also unconstitutionally vague.

Upon the consolidated appeal of the cases, the Fourth Circuit, ignoring the substantial findings of fact by the two

trial courts, in contravention of Rule 52(a) of the Federal Rules of Civil Procedure, reversed on the theory that the statutory scheme imposed only "incidental" restrictions on expression. The Fourth CIrcuit ruled that a rational basis for the law was all that needed to be, and actually was, satisfied. The Fourth Circuit discounted the equal protection, vagueness, and privacy challenges to the state statutes.

The basis for jurisdiction in the District Courts below was predicated upon 42 USC §1983 and 28 USC §1343 (deprivation of Constitutional rights under color of state law), 28 USC §1331 (federal question jurisdiction), 28 USC §§2201, 2202 (declaratory relief), and 28 USC §2284 (injunctive relief).

REASONS FOR ALLOWING THE WRIT.

The North Carolina statutes at issue represent a tremendously important, absolutely unwarranted, and perhaps inevitable attempt by a state legislature to extend this Court's decision in Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976), to criminally punish the dissemination of and to prohibit or impede public access to constitutionally protected forms of expression because of legislative hostility to the content of that expression. Thus, this cases raises First Amendment issues of the most fundamental importance. It raises the question of whether books and magazines which relate to sexual matters but which do not meet the test for obscenity may be discriminated against and the distribution of such publi-

cations may be discouraged if the State has a mere "rational basis" for doing so and it raises the question of whether the facts in the present case afford even a rational basis for interfering with First Amendment rights. On these points the decision of the Fourth Circuit has established a novel, and highly significant, and completely unfounded First Amendment doctrine. By the Fourth Circuit's decision legislation infringing on First Amendment rights is sufficiently "rational" to foreclose judicial inquiry even if "practically [inept]", "sheer silliness" or even assinine in terms of accomplishing its objective. (A.42).

Now that the bizarre infringement of First Amendment rights countenanced by the North Carolina statute has been approved by the United States Court of Appeals for the Fourth Circuit, it is likely to be copied and applied throughout the nation. Even in its present form the statute provides a substantial means of harrassing sellers of sexually oriented publications. It has substantially restricted the channels of communication for sexually oriented books and magazines. (A. 48, A66). With slight modifications the statute can represent an even more successful device for the suppression of non-obscene sexually oriented literature. Particularly disturbing is the possibility of the combination of North Carolina statutes with zoning ordinances such as those approved in Mini-Theaters.

Even worse, the principle underlying the statute can justify even wider suppression

of First Amendment rights than that undertaken so far. By the logic of the Fourth Circuit's decision, the State could decree that ordinary bookstores may not sell an appreciable number of sexually oriented books such as the Joy of Sex in pursuit of the "rational" objective of shielding young people and unwilling viewers from such materials. Or the State could provide that sexually oriented books could not be sold in regular bookstores at all. Since the nation is well-supplied with those who would regulate the reading habits of others, it is reasonable to expect that the possibility of suppression allowed by the Fourth Circuit's opinion will be thoroughly exploited. The Writ of Certiorari should be granted because the Fourth Circuit's opinion is contrary to all prior opinions of this Court.

The Fourth Circuit relied upon Mr. Justice Powell's concurring opinion in Mini-Theaters as the basis for developing the bizarre First Amendment Doctrine it developed in this case. The expression singled out for regulation by the North Carolina Legislature in adopting the statutes at issue here is in many respects identical to that which was offered in the theaters which were the subject of the Detroit "anti-skid row" zoning ordinance dealt with in Mini-Theaters. The means by which the expression is monitored or prohibited under the North Carolina scheme, however, is vastly different from that which was approved by the Court in Mini-Theaters.

1. The Detroit ordinance in Mini-

Theaters made no attempt to dictate the contents of the expression which could be offered or to which access could be gained in any single store. Rather, the government stayed entirely out of the business of monitoring what form of literature or movies or expression could or could not be offered or obtained in any business, so long as the establishment was sufficiently far away from another regulated establishment that the integrity of the urban environment was not compromised. The North Carolina statute, conversely, thrusts the State in the position of regulating the content of expression offered in any single store. If a "preponderance" of the literature and if a "preponderance" of of the movies are of the type prohibited by the act, they may not be offered on the same premises. The proprietors, the customers and the distributors of the expression must offer or obtain the particular expression in an entirely different location -- if, indeed, it is economically possible to maintain such an alternate establishment or physically possible to gain access to it. The City of Detroit regulates certain land uses in an across-the-board fashion, while the State of North Carolina, as censor, scrutinizes the contents of literature and movies offered in individual premises, and suppresses one or more forms of the expression unless it can be reduced below a preponderance or relocated elsewhere.

2. The ordinance in Mini-Theaters served the overriding city purpose of pre-

serving the urban environment by permissible and traditional zoning techniques. The North Carolina statute has no apparent purpose, other than to make it commercially impossible to operate an "adult" business. An establishment may sell a preponderance of "adult books" in a theater or show a preponderance of adult movies, but it may do no combination of the above. Nor may it sell "sexually oriented devices," including contraceptives, where an "adult establishment" is operating. The adult establishments must be split up: Whether next door, to the next block, by the schoolyard or into the suburbs, the act does not regulate. Prior to the legislation, persons desiring access to the expression or items here at issue could gain them at a particulary appropriate site, an "adult establishment" which was at a single location, closed to minors, and shielded from unwilling viewers. That is currently impossible, and for no apparent reason. No evidence was presented (and it is hard to imagine any) concerning why or how offering a preponderance of "adult books" is significantly different from offering less than a preponderance of "adult movies" for viewing. The State interest in compelling this peculiar result is, at best, elusive, and uncontrovertedly, is without any evidentiary basis in the record. The State might just as well have attempted to proscribe the works of Shakespeare and of Chaucer from being sold simultaneously in the same establishment, based upon a vague assertion of its police powers.

3. The Mini-Theaters ordinance, a

zoning regulation, had prospective application only, affecting none of the "adult establishments" already extant in Detroit. The North Carolina statute applies not only to new enterprises, but compels compliance by establishments which were doing business before the act was passed, and which have been forced to drastically sacrifice their operations to attempt to comply with the statute. Further, the North Carolina legislation is a criminal statute designed to criminally punish people for offering the proscribed types of expression; it makes no pretense of being a zoning or land use regulation.

4. The Court in Mini-Theaters was able to conclude that availability of the regulated expression would not be affected by the zoning ordinance, given the size and composition of the city of Detroit. 427 U.S. at 72, n.35. In contrast, the State of North Carolina is characterized by cities and towns of modest population, the economic bases of which are not likely or certain to sustain, as going business concerns, individual establishments which offer one and only one type of "adult expression." Indeed, affidavits submitted by various of the petitioners demonstrate that access to one or more types of the expression here at issue may well dry up, as it becomes economically impossible to maintain separate businesses, with attendant overhead costs, salaries, etc., to offer only one form of the regulated expression. Both trial courts specifically found as facts that the North Carolina statute will undoubtedly effectively suppress or greatly restrict access to lawful forms of speech across the state.

(A. 48, A66).

5. The vagueness aspect of the ordinance in Mini-Theaters was not squarely addressed because of the clear applicability of the regulation to the respondents in the case. Here, the vagueness issue must be considered because of terms in the statute which significantly affect the petitioners' own rights, which are uncertain in scope, and which will deter the petitioners from exhibiting films or offering literature which may or may not be prohibited under the act.

6. Finally, there is a right of privacy put in issue by the North Carolina legislation which was not asserted in Mini-Theaters. No building which contains "sexually oriented devices" (defined so as not to be exclusive of contraceptive devices) may also contain an "adult establishment"(where constitutionally protected expression may be housed). This compromise of Ninth Amendment and First Amendment interests -- one, but not both might be realized -- is another consideration mandated under the North Carolina act.

In this section below, the specific constitutional provisions and authorities upon which the bookstores rely, and which demonstrate that the North Carolina law is an important and impermissible attempt to restrict constitutionally protected principles, will be set forth.

I. THE NORTH CAROLINA STATUTE PROVIDING THAT BOOKSTORES SELLING PRIMARILY SEXUALLY ORIENTED BOOKS MAY NOT ALSO EXHIBIT PRIMARILY SEXUALLY ORIENTED MOTION PICTURES IN THE SAME BUILDING, STRUCTURE, ETC. VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE IT DEPRIVES SUCH STORES, THEIR CUSTOMERS, AND PRODUCERS OF SEXUALLY

ORIENTED MATERIAL OF THEIR RIGHTS UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND DEPRIVES THEM OF OTHER CONSTITUTIONAL RIGHTS.

A. The statute suppresses protected expression including political expression.

The statute in the present case (as the respondents have always conceded) is not aimed at controlling the dissemination of obscenity as defined by the Supreme Court in Miller v. California, 413 U.S. 15 (1973). In fact, the statute reaches political speech which should be entitled to the full protection of the First Amendment. An examination of the statute and the findings of fact by the trial courts in these two cases show political speech will be suppressed (at least partially) in petitioners' bookstores.

Magazines such as Playboy may well emphasize and certainly relate to sexual matters. Still such magazines have their Playboy philosophies, including a number of political beliefs: criticism of obscenity laws; criticism of laws restricting sexual conduct of consenting adults in private; and the like. By their advocacy of certain forms of sexual conduct now prohibited by North Carolina and other states, books like the Joy of Sex are direct criticisms of the assumptions underlying such statutes. See, for example, the discussion of normality in the Joy of Sex, p. 78 (Crown, 1972); and the discussion of "pornography" in the same book. (p. 204):

> pornography
>
> Name given to any sexual literature somebody is trying to

> suppress. Most normal people enjoy looking at sex books and reading sex fantasies, which is why abnormal people have to spend so much time and money suppressing them. . .

The Kinsey Report also falls within the statute's definition of the sort of literature which may get petitioners' bookstores into trouble if they carry too much of it at once. However, the political importance of the Kinsey Report is beyond doubt.

Many may find books such as Playboy and the Joy of Sex annoying, disgusting, and wrong. Still such books have political or ideological import. To suppress them, or countenance measures which lead to their suppression, even in certain locations, or to restrict the channels of communication through which they are distributed, is a step toward undermining the central purpose of the First and Fourteenth Amendments.

The films and literature which the North Carolina statutory scheme has its direct impact on are forms of expression fully protected by the First and Fourteenth Amendments. Young v. American Mini-Theatres, Inc., 427 U.S. 50 (1976) (Powell J., concurring, and Stewart, Brennan, Marshall, and Blackmun, J.J., dissenting); Edwards v. South Carolina, 372 U.S. 229 (1963) (First Amendment applies to the states through the Fourteenth Amendment). As the Court noted in Roth v. United States, 354 U.S. 476, 487 (1954):

> [S]ex and obscenity are not synonymous . . . . [P]ortrayal of sex, e.g., in art, literature,

> and scientific works, is not itself sufficient reason to deny material the constitutional protection of speech and press. Sex, a great and mysterious motive force of human life, has indisputably been the subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern.

B. The effect of the statute on the availability of sexually oriented, constitutionally protected, materials is substantial.

As noted above, the Eastern District found as a fact that the North Carolina legislation restricted the adult stores' ability to sell and display sexually oriented publications since much of their space had to be devoted to non-sexually oriented books in order to comply with the statute. Most of the stores responded to the statutory scheme by raising publication inventories of non-sexually oriented books to 51% or more. This step was taken to enable the adult bookstores to continue in the business of showing sexually oriented movies or mini-movies.

The effect of the statute on access to the bookstores by patrons and producers of sexually oriented publications is, therefore, exactly the same as if the legislature had passed a statute stating that no bookstore could carry as over 50% of its publication inventory sexually oriented books. The result is to close approximately 50% of the channel of communication which has previously existed in petitioners' stores for sexually oriented

material.

This Court's plurality opinion in Mini-Theaters noted, in reaching its conclusion, that:

> The situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech. Here, however, the District Court specifically found that "[t]he Ordinances do not affect the operation of existing establishments but only the location of new ones. There are myriad locations in the City of Detroit which must be over 1000 feet from existing regulated establishments. This burden on First Amendment rights is slight." 373 F.Supp. at 370. [427 U.S. at 71 n.35.]

And in his concurring opinion in Mini-Theaters, Mr. Justice Powell stated even zoning legislation cannot (1) impose a limitation on the content or availability of matter protected by the First Amendment, and (2) restrict in any significant way patrons' access to such matter. 427 U.S. at 78. The North Carolina legislation fails both prongs of Justice Powell's test, and enjoys none of the factual basis relied on by the plurality in Mini-Theaters. Here, factual findings by both trial courts are contrary to those

found by the Federal District Court in Michigan which took evidence on the Detroit Ordinance involved in Mini-Theaters.

The Fourth Circuit's conclusion that "thus far the adult establishments involved here have apparently opted for compliance rather than closing, so that the overall availability of their materials would seem to be little effected" (A. 18, emphasis added) shows that the Fourth Circuit panel overlooked or ignored the findings made by the trial courts below. As has already been pointed out, the Eastern District found facts tending to show that approximately 51% of the channel of communication for sexually oriented books had been eliminated by the effort of the adult bookstores to comply with the statute. Such ignoring or overlooking undisputed findings of fact by the two trial courts is a clear violation of Rule 52(a) of the Federal Rules of Civil Procedure.

In sum, the Fourth Circuit was entirely wrong in relying upon either the plurality opinion in Mini-Theaters or Mr. Justice Powell's concurring opinion to uphold this pernicious North Carolina Act. As a matter of fact, the North Carolina statutes directly impact -- rather than merely indirectly -- on expression fully protected by the First Amendment. Also, unlike the situation in Mini-Theaters, the record made in the two trial courts in this case factually shows that the North Carolina legislation will substantially affect the availability of the expression which the North Carolina legislature does not like and therefore seeks to directly curtail.

C. The Fourth Circuit's conclusion that a mere rational relation is sufficient to justify legislation infringing on First Amendment rights is contrary to prior opinions of this Court.

The Fourth Circuit made a serious mistake in fundamental First Amendment law when it suggested that where First Amendment values are at stake, "a legislative approach need simply be rationally related to the State's objective when [the statute was] enacted. . ." (A. 35 , emphasis supplied). Even if legislation infringing on First Amendment rights were "practically [inept]," "sheer silliness" or "assinin[e]" the Fourth Circuit suggests such an interest would be sufficient to overcome First Amendment rights.

With all due respect, this is simply not the law. To impact upon First Amendment rights, the state must demonstrate a compelling interest. New York Times v. United States, 403 U.S. 713 (1971). Furthermore, an "important or substantial burden rests upon the state when it would limit in any way First Amendment rights, [and] it is necessary to identify with specificity the nature of the infringement in each case," Young v. American Mini-Theaters, Inc., 427 U.S. 50, 76 (1976) (Powell J., concurring) (emphasis added).

The words of Justice Rutledge in Thomas v. Collins, 323 U.S. 516, 529-30 (1944) still accurately reflect the state of the law:

> [A]ny attempt to restrict [First Amendment liberties] must be

> justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. [Emphasis added.]

The Fourth Circuit erroneously relies on Paris Adult Theater v. Slayton, 413 U.S. 49 (1973) to justify its rational basis approach to First Amendment problems. In doing so, the Fourth Circuit evidently failed to take note of the following language from the Paris opinion itself: "It is not for us to resolve the empirical uncertainties of State legislation, save in the exceptional case where that legislation plainly impinges on rights protected by the Constitution itself." 413 U.S. at 60 (emphasis added).

Moreover, even if the rational basis test enunciated by the Fourth Circuit were the law, there is absolutely nothing in the record from the trial of these cases in the District Courts below to support the proposition that, in the words of the Fourth Circuit's opinion, "[t]he legislature could reasonably have determined that the development of the 'total, under one roof' approach to the marketing of sexually explicit materials and devices tended to produce secondary effects destructive of the general quality of life in the neighborhood" and that "dispersal of marketing activities [even to a building merely next door] might ameliorate the

secondary effects to some extent, thereby furthering the State's interest." The Fourth Circuit also states that such a conclusion "cannot be thought unreasonable." (A. 25 , emphasis supplied). The Fourth Circuit is unable to identify any of the supposed secondary effects; is unable to point to anything in the record showing any destructiveness of the general quality of life in any neighborhood -- in short the Fourth Circuit is straining to find even some rational basis for this legislation which simply is not there.

D. The Fourth Circuit's conclusion that the North Carolina statute is merely a regulation of time, place and manner is also contrary to the decisions of this Court.

The Fourth Circuit also made a serious mistake of First Amendment law by holding that the North Carolina statutory scheme involved here is constitutional because it is merely a regulation of time, place and manner of expression. The standard against which a purported time, place, and manner regulation must be tested is set out in Grayned v. City of Rockford, 408 U.S. 104, 116 (1972) (footnotes omitted):

> The nature of a place, "the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable." . . . The crucial question is whether the manner of expression is incompatible with the normal activity of a particular place at a particular time.

It is ludicrous to suggest, as the Fourth Circuit and the North Carolina legislature did, that selling sexually oriented books and movies in one building, or selling contraceptives, are incompatible activities. Indeed, what better place is there to disseminate this type of expression than in a business where only adults eighteen or over are allowed, and which is inaccessible to children and teenagers?

The Fourth Circuit cited Grayned for its curious proposition, but apparently overlooked or ignored the test from Grayned stated above. The Fourth Circuit also cited California v. LaRue, 409 U.S. 109 (1972) and Cox v. New Hampshire, 312 U.S. 569 (1941). The decision in Cox is totally inapposite. That case simply holds that a city may require a group to obtain a parade permit, for a nominal fee, before conducting a parade. By analogy, the State may require adult bookstores to purchase business licenses, provided that the license fees are not set artificially high to suppress the types of material handled. The decision in California v. LaRue is also totally inapposite, since no alcoholic beverages are served in petitioners' bookstores. To justify the result reached in LaRue, this Court of course relied on "the broad sweep of the Twenty-First Amendment" which it said "has been recognized as conferring something more than the normal State authority over public health, welfare and morals." 409 U.S. at 114.

E. The statute in this case is also void because the restriction of First Amendment rights is greater than that essential to the furtherance of any legitimate State interest.

As noted in some detail above, the Fourth Circuit overlooked or ignored findings of fact by two federal trial courts which undercut the conclusion that the North Carolina statutory scheme imposes only an "incidental restriction on First Amendment interests . . . no greater than is essential to furtherance of the state's interest." (A. 28).

Because of the primary significant effect upon First Amendment rights found by the two trial courts, the four-part test from United States v. O'Brien, 391 U.S. 367, 377 (1968) was wrongly applied by the Fourth Circuit in this cause to measure the constitutionality of the law. It should be noted, first, that O'Brien upheld a regulation primarily of conduct or noncommunicative aspects of protected materials. The North Carolina law, on the other hand, directly impacts on actual dissemiantion of movies and printed material which are completely communicative in nature. Moreover, even where primarily conduct or noncommunicative aspects of protected materials are involved, a regulation cannot be sustained unless (1) it is within the constitutional power of government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to suppression of free expression; and (4) incidental restriction on First Amendment freedoms is no greater than essential to further the imporatant or substantial governmental interest.

The North Carolina statuory scheme fails the second, third, and fourth prongs of the O'Brien test. Both of the federal trial courts which heard this case below

agreed that no legitimate governmental interest is served by the statute. As Mr. Justice Powell noted in his concurring opinion in Mini-Theaters, it is the state which bears a substantial burden to show what the compelling or substantial interest is when it seeks to limit First Amendment rights in any way. 427 U.S. at 76. The suggested, though unevidenced, interest which the North Carolina legislation is designed to serve is to improve the tone of community life by doing away with masturbation which allegedly occurred in some bookstores. A single letter, quoted by the Fourth Circuit in footnote 9 to its opinion (A. 24-A25) was introduced into the record to the effect that persons frequenting some mini-motion picture theaters in some book stores were wont to masturbate in them. This letter was introduced for the sole purpose of attempting to show what the legislature had before it when the statutory scheme was enacted. The letter was not accepted as evidence of the truth of any matter asserted therein. This is the only "evidence" in the record relied on by the state to show justification for this legislation. The record neither shows nor suggests -- not suprisingly -- that such conduct (assuming arguendo that it occurs) is exacerbated or dimished because of the presence or absence of an adult bookstore and an adult motion picture theater in the same building. Judge Dupree, one of the trial judges below, quite correctly concluded that:

> [T]he court fails to perceive a rational relationship between the worthy goal of improving community tone and this statute. At best, the means chosen by the legislature would have a minimal effect on degenerate conduct that now allegedly occurs within some adult-oriented establishments. Even this requires acceptance of the dubious logic that the stimulation provided by an adult movie is enhanced by having passed a rack of similarly-oriented books on the way into the theater, an assumption unsupported by the record.

(A. 62) (emphasis added).

Even assuming this finding is incorrect, prior decisions of this Court show that any regulation of First Amendment rights must be no broader than absolutely necessary to meet the state's legitimate compelling and substantial interests. See Grayned, supra, 408 U.S. at 117, and cases cited at n.35. In the First Amendment area, a statute passed under the police power of the state which actually does seek to further a compelling or substantial governmental interest is unconstitutional where less burdensome means are available to accomplish the asserted interest. Linmark Associates, Inc. v. Willingboro, 431 U.S. 85 (1977); United States v. Robel, 389 U.S. 258 (1967); Shelton v. Tucker, 364 U.S. 479 (1960); Schneider v. New Jersey, 308 U.S. 147 (1939).

Judge Dupree in his opinion for the Eastern District noted, quite correctly, that any of the problems set out in the letter from the health inspector can be handled directly by legislation which does not regulate the dissemination of consti-

tutionally protected books and movies. Indeed, North Carolina by statute already gives public health officers wide powers to correct unsanitary or unhealthful conditions. See N.C.G.S. §§130-19 and 130-20 (1974 replacement).

Finally, as has been pointed out above, the findings of facts by the trial courts, which should have been binding on the Fourth Circuit through Rule 52(a) of the Federal Rules of Civil Procedure, show that the restriction of the North Carolina legislation on First Amendment freedoms is not incidental; moreover, it is not narrowly drawn to make the restrictions no greater than essential to further the vague and amorphous state interest here purportedly involved.

F. The North Carolina statute is unconstitutional since it conditions the exercise of one First Amendment right on the abandonment of the exercise of other constitutional rights in the same establishment.

The effect of the statute in the present case is to penalize those who exercise their constitutional right to sell sexually oriented books and magazines by depriving them of their right to exhibit predominantly sexually oriented motion pictures or to sell contraceptives in the same establishment. Such a requirement violates the general rule that the state may not penalize a person for the exercise of First Amendment rights. For that reason it may not ordinarily require a person exercising one constitutional right to surrender another. The rule applies at least in the absence of a compelling state interest or of an extraordinary grant of con-

stitutional power over a narrow subject such as the sale of liquor. Frost and Frost Trucking Co. v. Railroad Comm'n., 271 U.S. 583, 593-594 (1926); Lefkowitz v. Cunningham, 431 U.S. 801 (1977); Sherbert v. Verner, 374 U.S. 398, 409 (1963); Speiser v. Randall, 357 U.S. 513, 518-19 (1958); Bates v. Little Rock, 361 U.S. 516 (1960); Grossjean v. American Press Co., 297 U.S. 239, 250 (1936).

Moreover, because "sexually oriented devices," which necessarily includes contraceptives, cannot lawfully be made available under the North Carolina staturoy scheme where constitutionally protected expression in the form of a preponderance of "adult books" or "adult movies" are offered, the legislation effectively compels a trade-off between the petitioners' exercise of First and Ninth Amendment rights. Carey v. Population Services Int., 431 U.S. 678 (1977); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

Many of the establishments which were the targets of the statute responded to it by abandoning the sale of sexual devices and by carrying and acquiring more non-sexually oriented publications than sexually oriented ones. Even this effect of the statute is unconstitutional. To require a bookseller to carry certain types of books as a condition of selling others is a clear burden on his First Amendment rights. There is no compelling interest to justify such a requirement. Wooley v. Maynard, 430 U.S. 705, 714 (1977);

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

G. The statute is unconstitutional because it seeks to close a place which is in every other respect a proper one for the exercise of First Amendment rights to certain types of protected speech and press.

The statutory scheme here would permit, for example, the exhibition of non-sexually oriented picture films in a place where a preponderance of sexually oriented books were sold. The State may not close a place which is in every other respect a proper one for the exercise of First Amendment rights to certain types of protected speech and press. The decision of the Fourth Circuit allowing this is contrary to decisions of this Court. See, Police Department of Chicago v. Mosley, 408 U.S. 92 (1972). A case in point is Schneider v. New Jersey, 308 U.S. 147 (1939). In that case, this Court held that a municipal ordinance which banned the distribution of literature on public streets (but not in other places such as parks) was invalid. The Court specifically rejected the suggestion that the ordinance was constitutional because the right to distribute literature could be exercised in places other than streets. As this Court noted: "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." 308 U.S. at 163-164. Accord, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).

H. The statute in this case is an invalid prior restraint prohibited by the First Amendment to the United States Constitution and the Fourth Circuit's decision upholding

it is contrary to decisions of this Court.

The statute in the present case is a prior restraint since it absolutely bans the sale of books and magazines (in a place where sexual films are shown) if the books and magazines are mostly characterized by an "emphasis" on sexual activities or anatomical areas. The result is to ban the sale of some books and magazines prior to their dissemination and without regard to obscenity. Such a massive prior restraint is impermissible. Compare, Near v. Minnesota, 283 U.S. 697 (1931) with Organization for a Better Austin v. Keffe, 402 U.S. 415, 418 (1971) and New York Times v. United States, United States v. Washington Post Co., 403 U.S. 713 (1971).

The idea that the statute can be sustained because the sexual publications banned under it may be sold elsewhere has been rejected in Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 556 (1975).

The fact that the statutes involved in the present case provide for a subsequent punishment does not prevent the legislation from being a prior restraint. Prior restraints include not only injunctions against the expression which may be uttered in the future, and denial of licenses, but also include broad attempts to ban expression to be uttered in the future by means of a criminal statute which does not focus narrowly on the question of whether the expression itself is unprotected. For a list of cases which this Court has regarded as prior restraints (including some providing for subsequent punishment), see Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 72 (1963).

II. THE STATUTE DEPRIVES PETITIONERS OF EQUAL PROTECTION OF THE LAWS AND THE FOURTH CIRCUIT'S DECISION UPHOLDING IT IS CONTRARY TO DECISIONS OF THIS COURT.

Closely related to the First Amendment problems presented by the legislation at issue, are equal protection difficulties arising under the Fourteenth Amendment. Without discernible rationale -- and without any evidentiary basis whatsoever in the record -- North Carolina subjects sexually oriented books, magazines, and movie pictures to dramatically different treatment allowed materials which are not sexually oriented within the definition of the statute. These distinctions made by the legislation deny the petitioners and their customers the equal protection of the laws. Such distinctions serve no rational purpose or goal other than the destruction or impairment of petitioners' businesses. The District Court which considered this case below made findings of facts showing that the likely effect of the statute will be to economically impair the petitioners' businesses by doubling overhead costs, wages, rents, etc., or by requiring a large inventory of non-sexually oriented books. This result will make it difficult for the petitioners to be able to continue doing businesses and will certainly restrict access to the expression here concerned even if business is continued in one store which attempts to comply with the statute. Certainly a "bare [legislative] desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." U.S. Department of Agriculture v. Marino, 413 U.S. 528, 534 (1973).

Since the distinctions here impinge on First Amendment rights and do not serve

any compelling or substantial governmental interest and are not substantially related to the achievement of any important governmental objective, the statute violates the equal protection clause. Craig v. Boren, 429 U.S. 190 (1976); United States v. O'Brien, 391 U.S. 367 (1968); Police Department of Chicago v. Mosley, 408 U.S. 92, 102 (1972).

The statute also violates the equal protection clause with reference to its ban on the sale of contraceptives or "sexual devices." The sale of such items to adults in the absence of some substantial health hazard is constitutionally protected. Griswold v. Connecticut, 381 U.S. 479 (1965); Carey v. Population Services, 431 U.S. 678 (1977). Even under the analysis of the plurality opinion in Mini Theatres, the North Carolina legislation does not withstand scrutiny under the equal protection clause. Speaking for the plurality, Mr. Justice Stevens observed the following with reference to the equal protection inquiry:

> The remaining question is whether the line drawn by these ordinances is justified by the city's interest in preserving the character of its neighborhoods. On this question we agree with the views expressed by District Judge Kennedy and Gubow. The record discloses a factual basis for the Common Council's conclusion that this kind of restriction will have the desired effect. . . .

427 U.S. at 71 (footnote omitted).

Because the North Carolina statutory scheme affects protected expression, because the interests which it purportedly serves are neither rational nor justified by any evidentiary basis whatsoever in the record, and because its ostensible goals could be achieved through the enforcement of more narrowly drawn and existing statutes, the legislation here cannot survive scrutiny under the equal protection clause. See Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Williams v. Rhodes, 393 U.S. 23 (1968).

III. THE STATUTORY SCHEME IN THE PRESENT CASE IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD AND THE FOURTH CIRCUIT'S OPINION APPROVING IT IS CONTRARY TO DECISIONS OF THIS COURT.

A. The statutory scheme is unconstitutionally vague.

In the case at hand the vagueness aspects of the legislation must be squarely addressed and, once addressed, must be acknowledged as failing to pass muster under the First and Fourteenth Amendments. This Court has always held that laws imposing regulations on protected expression must be scrutinized with particular care for precision of terms and narrowness of applications. This is because uncertain or unclear statutory definitions lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden area were clearly marked. Hynes v. Mayor and Council of Borough of Oradell, 425 U.S. 610, 620 (1976); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Grayned v. City of Rockford, 408 U.S. 104 (1972).

Among the most troubling aspects of the statutes here involved are those which define the various adult establishments as those having movie pictures or books " a preponderance" of which are "distinguished or characterized by an emphasis" on matter "depicting, describing or relating to" certain sexual activity. Do periodicals such as Playboy "emphasize" such matter? What about Esquire? Does a book such as Lady Chatterlee's Lover? Fanny Hill? What about The Scarlett Letter? In a real sense, the entire plot of The Scarlett Letter is related to a specified sexual activity -- sexual intercourse in an adulterous relationship. All of these questions are pertinent because a great number of contemporary books and magazines deal with sexual matter. The words "depicting," "describing," "or relating to" may allow a publication to be characterized as "adult" because its overall theme may be concerned with "specified sexual activities" of the type either explicit or implicit in many love stories, and indeed in many classics of literature.

The term "preponderance" as used in the statutory scheme is unconstitutionally vague. The statute does not absolutely prohibit simultaneous dissemination of "adult" movies and "adult" books. Petitioners are absolutely without guidance on the meaning of the term "preponderance." Neither temporal nor quantitative standards are provided. There is no way of determining whether any time factor should be figured into the statute to discern whether a "preponderance" of motion pictures are of a nature meant by the legislation. Businesses which show full-length motion pictures often run the same film over several weeks. Is such a business an "adult" motion picture theater on the

day it has a film "emphasizing" those things found in the statute, and not on the other days, or should the evaluation of this cover a period of weeks or months? If so, what time period is the measure? Does the length of the film have any import within the statutory term "preponderance"? The statute does not answer any of these questions, and therefore requires petitioners to guess at their peril if they wish to exercise their First Amendment rights and protect the First Amendment rights of their customers to dissemination of both movie picture film and literature.

The legislation's definition of place where simultaneous distribution of sexually oriented publications may not occur is also unconstitutionally vague. Under that, two adult establishments may not be in the same "building, premises, structure, or other facility." These terms are undefined. The statute is problematical in this regard especially because of its lack of a mens rea or "scienter" requirement. It is of cold comfort to the petitioners that, as the Fourth Circuit suggests, the North Carolina state courts may construe the statute in such a way as to read in a scienter requirement. The legislation itself has none, and the petitioners in the present case run a risk of being convicted of a crime in order to get the North Carolina courts to construe the legislation.

Under the North Carolina statutory scheme, a crime could be committed without the defendant's knowledge of the violation. In either a high-rise building or shopping mall, for example, one operating an "adult estabishment" can be put in violation of

the law when, on another floor in the building or in a different section of the mall, another businessman opens an "adult establishment" or possesses "sexually oriented devices" (including contraceptive devices which might be contained in a pharmacy). A business next door could also be guilty of a crime based on the shifting inventory of another business. For these reasons, also, the statute is unconstitutionally vague and the Fourth Circuit's decision upholding it is wrong. See Hynes v. Oradell, 425 U.S. 610 (1976); Smith v. California, 361 U.S. 147 (1959); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

The Fourth Circuit's upholding the terms used in the North Carolina statutory scheme in reliance upon Miller v. California, 413 U.S. 15, 24 (1973) is mistaken. In Miller this Court upheld against constitutional challenge the definition of obscenity which included the requirement that the material lack serious value. This standard was designed to permit the suppression only of expression not protected by the Constitution. Here, the standard is designed to permit the suppression of material which is protected, concededly, by the First Amendment. Furthermore, the definitions used by the statutory scheme in the present case permit suppression if the materials emphasize matters "depicting, describing or relating to," sexual activity. A definition providing for the suppression or control of literature or movie pictures emphasizing matter "relating to" sexual activity has never been approved by this Court and is so far reaching and vague that its approval by the Fourth Circuit should be disapproved.

B. The petitioners have "standing" to

attack the vagueness of the legislation and the conclusion of the United States Court of Appeals for the Fourth Circuit to the contrary is in conflict with well settled decisions of this Court.

In Mini-Theaters, the theater and mini-theater involved in that case proposed to offer adult fare on a "regular" basis. As a result, under the somewhat different ordinance in that case, there was no question that the theaters were covered. This Court held, therefore, that any vagueness on the question of coverage did not affect the plaintiffs. Here, however, one of the petitioners below, Raleigh Books, had always sold a large number of non-sexually oriented books. Three of the petitioners, Hart Book Stores, Frye, and Raleigh Books, had modified their business operations by acquiring more non-sexually oriented publications than sexually oriented publications and had abandoned the sale of devices. (See Findings of Fact 10-12, A. 66-67). The result of this modification was that the establishments were probably not in violation of the statute but might find themselves in violation if their inventory tipped the wrong way.

As the findings of fact of both trial courts showed, the vagueness of the statute affected these petitioners continuously. After acquiring non-sexually oriented books as over 50% of their publication inventory, these bookstores were forced to scrutinize the books with great care to determine whether they were characterized by an emphasis on matters relating to sexual conduct. Since many paperback books from major publishers and many current novels fit this vague definition, the bookstores were forced to guess at their peril in attempting to avoid tipping their inventory and thus falling into criminal liability.

This is, therefore, the classic case where petitioners have "standing" to raise vagueness arguments. The Fourth Circuit's conclusion that the statute clearly applies to all of the petitioners overlooks a change in business operations which was forced by the passage of the statue, and also overlooks findings of fact by the United States District Court for the Eastern District of North Carolina. (Findings of Fact 10 and 11, A.66-67).

Since petitioners complain about the present effect of the statute on them and its present vagueness, they should certainly be entitled to raise this contention. The ruling of the United States Court of Appeals for the Fourth Circuit on this point is contrary to decisions of this Court and creates a sort of a "Catch-22" whereby in certain circumstances, at least, a statute can never be challenged on First Amendment vagueness grounds. A business not covered by the statute in the first instance, and consequently not affected by the statute, cannot challenge it. Under the Fourth Circuit's rationale a business originally covered by the statute but which changes its operations in an attempt to comply also cannot challenge the statute because there was a time at which it was clearly covered.

C. The statutory scheme in this case is overbroad.

The statutory scheme in this case would

ban (in certain establishments) material protected by the First Amendment. In addition, because of the definitions used in the statutory scheme, obviously material which may not be entitled to First Amendment protection -- that is, obscenity -- may also be banned.

Since the statutes bring within their proscription protected as well as unprotected expression, the statutory scheme is unconstitutionally overbroad. See Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Winters v. New York, 333 U.S. 507 (1948).

CONCLUSION

The decision of the Fourth Circuit in this case has restricted and degraded precious First Amendment rights far beyond what is permitted by applicable decisions of this Court. The decision below has sown the seeds of doctrine likely to result in even further restrictions and degradations of these rights. The Fourth Circuit has upheld a statute which that Court itself admitted may be silly, asinine, and inept in achieving any substantial or compelling governmental interest, but which is a legislative scheme clearly designed for its central purpose -- the harrassment of those selling sexually oriented constitutionally protected material.

For these reasons, and for the specific ones set out above, petitioners respectfully request that this Court issue its writ of certiorari to review the decision of the United States Court of Appeals for the

Fourth Circuit.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1979

No. ~~79-1352~~

HART BOOK STORES, INC., et al.,

Petitioners,

v.

RUFUS EDMISTEN, et al.,

Respondents.

* *

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

* *

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1979

No. _____

HART BOOK STORES, INC., et al.,

Petitioners,

v.

RUFUS EDMISTEN, et al.,

Respondents.

* *

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

* *

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

* *

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APPENDIX A-1

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 78-1461

Hart Book Stores, Inc.; Raleigh Books, Inc.; Tri-State News, Inc.; Ronald Mothershead, d/b/a R. and M. Adult Book Store; Jesse F. Frye, Jr., d/b/a L. & J. News Stand; Larry Gene Moore, d/b/a E. & M. EnterPrises; Thomas Page, d/b/a Player's Book Stores; Joseph Raymond Mc Broom, d/b/a M Distributors; Camera's Eye, Inc., a North Carolina Corporation,

Appellees

versus

Rufus Edmisten, Attorney General of North Carolina; Randolph Riley, District Attorney for 10th Judicial District; E. Raymond Alexander, District Attorney for 18th Judicial District; Donald K. Tisdale, District Attorney for 21st Judicial District; Donald Jacobs, District Attorney for 8th Judicial District; Dan K. Edwards, District Attorney for 14th Judicial District; H. W. Zimmerman, District Attorney for 22nd Judicial District; Donald Greene, District Attorney for 25th Judicial District; James C. Roberts, District Attorney for 19th Judicial District, W. A. Allen, Sheriff Durham County, North Carolina; T. B. Seagroves, Chief of Police, City of Durham, North Carolina; The State of North Carolina; William H. Andrews,

District Attorney for 4th Judicial District; William Allen Cobb, District Attorney for 5th Judicial Circuit; Edward W. Grannis, Jr., District Attorney for 12th Judicial District; Wade Barber, Jr., District Attorney for 15(b) Judicial District; C. D. Knight, Sheriff, Orange County, North Carolina; Herman Stone, Chief of Police, City of Chapel Hill, North Carolina,

Appellants.

Appeal from the United State District Court for the Eastern District of North Carolina, at Raleigh. Franklin T. Dupree, Jr., District Judge.

No. 78-1706

U. T. Incorporated, a Georgia corporation, d/b/a Camera's Eye Bookstore; and Mind's Eye, Inc., a North Carolina Corporation, d/b/a Mind's Eye and Imperial Book Store,

Appellees,

versus

Rufus Edmisten, Attorney General of the State of North Carolina; Joseph Brown, District Attorney of the Twenty-Seventh Judicial District and Individually; C. C. Elmore, Chief of Police of City of Gastonia, and Individually; Peter Gilchrist, District Attorney for the Twenty-Sixth Judicial District and

Individually; Donald Greene, District Attorney for the Twenty-Fifth Judicial District and Individually,

Appellants.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge.

Argued April 4, 1979/Decided December 4, 1979

Before Jean S. BREITENSTEIN, United States Circuit Judge for the Tenth Circuit, sitting by designation, WIDENER and Phillips, Circuit Judges.

Arnold Loewy, Professor of Law, University of North Carolina (Rufus L. Edmisten, Attorney General, Marvin Schiller, Assistant Attorney General on brief) for Appellants; Michael K. Curtis (Smith, Patterson, Follin, Curtis, James & Harkavy; Thomas F. Loflin, III, Loflin, Loflin, Galloway, Leary & Acker on brief) for Appellees.

PHILLIPS, Circuit Judge:

The issue on these consolidated appeals is the constitutionality of a North Carolina statute providing that a single building that contains an adult bookstore, adult theater, adult mini-theater, massage parlor, or sexual device wares cannot contain a second such "adult establishment."[1] Two

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[1] N.C. Gen. Stat. §14-202.10. Definitions. - As used in this Article:

(1) "Adult bookstore" means a bookstore having as a preponderance of its publications, books, magazines, and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing, or relating to specified anatomical areas, as defined in this section.

(2) "Adult establishment" means an adult bookstore, adult motion picture theater, adult mini motion picture theater, or a massage business as defined in this section.

(3) "Adult motion picture theater" means an enclosed building with a capacity of 50 or more persons used for presenting motion pictures, a preponderance of which are distinguished or characterized by an emphasis

on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas, as defined in this section, for observation by patrons therein.

(4) "Adult mini motion picture theater means an enclosed building with a capacity for less than 50 persons used for presenting motion pictures, a preponderance of which are distinguished or characterized by an emphasis on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas, as defined in this section, for observation by patrons therein.

(5) "Massage" means the manipulation of body muscle or tissue by rubbing, stroking, kneading, or tapping, by hand or mechanical device.

(6) "Massage business" means any establishment or business wherein massage is practiced, including establishments commonly known as health clubs, physical culture studios, massage studios, or massage parlors.

(7) "Sexually oriented devices" mean without limitation any artificial or simulated specified anatomical area or other device or paraphernalia that is designed in whole or part for specified sexual activities.

(8) "Specified anatomical areas" means:
   a. Less than completely and opaquely covered: (i) human genitals, pubic region, (ii) buttock, or (iii) female breast below a point immediately above the top of the areola; or
   b. Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

(9) "Specified sexual activities" means:
   a. Human genitals in a state of sexual stimulation or arousal;
   b. Acts of human masturbation, sexual intercourse or arousal;
   c. Fondling or other erotic touchings of human genitals, pubic regions, buttocks or female breasts.

§ 14-202.11. Restrictions as to adult establishments.

No building, premises, structure, or other facility that contains any adult establishment shall contain any other kind of adult establishment. No building, premises, structure or other facility in which sexually oriented devices are sold, distributed, exhibited, or contained shall contain any adult establishment.

§ 14-202.12. Violations; penalties.
Any person who violates G.S. 14-202.11 shall be guilty of a misdemeanor and shall be imprisoned for a term not to exceed three months or fined an amount not to exceed three hundred dollars ($300.00), or both, in the discretion of the court. Any person who has been previously convicted of a violation of G.S. 14-202.11, upon conviction for a second or subsequent violation of G.S. 14-202.11, shall be guilty of a misdemeanor and shall be imprisoned for a term not to exceed six months or fined an amount not to exceed five hundred dollars ($500.00), or both, in the discretion of the court.

federal district courts determined, in separate suits brought by the proprietors of affected establishments that the statute abridged freedoms of speech and press protected by the First and Fourteenth Amendments, the requirement of equal protection imposed by the Fourteenth Amendment, the due process proscription against vagueness, and the right of privacy guaranteed by the Constitution. On the defendant's appeals, consolidated in this court, we conclude that the Supreme Court decision in Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) essentially controls decision here and requires reversal. We do so, and sustain the statute over free speech and press, equal protection, vagueness and privacy objections.

The statute under attack prohibits the location of any one "adult establishment" in the same "building, premises, structure, or other facility" occupied by another adult establishment or sexual device vendor. N.C. Gen. Stat. §14-202.11. "Adult establishment" is defined to include adult bookstores, adult motion picture theaters, and adult mini-theaters, having a "preponderance" of wares "distinguished or characterized by an emphasis on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas," and also to include massage businesses. Id. at §14-202.10. "Specified sexual activities" and "specified anatomical areas" are defined as sexually explicit or erotic things. Id. Violations are made misdemeanors, punishable by fines up to $500.00 and imprisonment up to six months. Id. §14-202.12.

Civil actions challenging the statute in the Eastern and Western Districts of North Carolina requested injunctive and declaratory relief. The proprietor-plaintiffs alleged, and the district courts below found, that the statute limited plaintiffs' ability to choose the types of material to be sold or exhibited in their stores; that in order to avoid prosecution, the plaintiffs who sold both books and films emphasizing sexual matters were obliged to acquire a preponderance of non-sexually-oriented books in order to continue the exhibition of sexually-oriented films; and that all of them abandoned the sale of sexual devices in order to comply with the statute. The plaintiffs alleged that these changes increased the cost of doing business though none went so far as to contend that they had been forced to close their establishments or that their demise was imminent as a result of their compliance with the statute.

On the basis of these findings, one district court held in consolidated actions, Hart Book Stores, Inc. v. Edmisten, 450 F. Supp. 904 (E.D.N.C. 1978), that the North Carolina statute violates the First Amendment and the equal protection guarantees of the Fourteenth Amendment, in that it allows, without sufficient justification, a "significant intrusion" into businesses dealing in materials protected by the First Amendment. Id. at 906. The court further concluded that Young v. American Mini-Theaters, Inc., 427 U.S. 50 (1976) did not apply because the North Carolina statute, unlike the ordinance upheld in

Mini-Theaters, was not a true zoning law. 50 F.Supp. at 906-07.

In U.T. Inc. v. Edmisten, Nos. 77-365 and 77-366 (W.D.N.C. July 24, 1978), the other district court also found that the statute contravened freedom of speech and equal protection. Additionally, the latter court held the statute unconstitutionally vague and in violation of the right of privacy. Id., slip op. at 4-5. Finally, that court also concluded that Mini-Theaters did not control the case before it and was not inconsistent with its ruling. Id. at 6.

I.

Unlike the district courts, we consider that the Supreme Court decision in Mini-Theaters, upholding a Detroit ordinance that prohibited locating "adult" establishments within one thousand feet of each other, essentially controls decision here. Since much of our analysis parallels and draws from the Mini-Theatres analysis, it seems appropriate at the outset to summarize the salient factual aspects of that case, comparing them with comparable aspects of the instant cases, and then to summarize what appear to us the critical features of that decision.

The Detroit ordinance prohibited "more than two [regulated] uses within one thousand feet of each other," id. at 54 n.6, and defined regulated uses as adult book stores, adult motion picture theaters, adult mini motion picture theaters, cabarets with nude or partially-nude entertainment, and also dance halls, bars, pool halls, public

lodging facilities, secondhand stores, pawnsyops, and shoeshine parlors, id. at 52 n.3. The ordinance defined adult bookstores, adult theaters, and adult mini-theaters as those "distinguished or characterized by their emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas,'" id. at 53-54 n.5, and defined those sexually-explicit activities or areas in terms virtually identical to the North Carolina statute, id. at 53 n.4.

In addition to their similar terms and definitions, both the Detroit and North Carolina laws essentially regulate in similar fashion the place and manner of "adult establishment" operations. The fundamental effect sought by both is geographic dispersal of these operations, in an obvious attempt to reduce adverse external effects perceived to result from a concentration of "adult" activities. They differ only in the methods chosen to force dispersal: Detroit permits adult bookstores, theaters, and mini-theaters to operate only if they are at least 1,000 feet from any other adult establishments and other regulated uses, while North Carolina permits such adult bookstores, theaters and mini-theaters to operate only if they are in a different building and on different premises from any one such adult establishment and other regulated uses (i.e., massage parlors or sexual device vendors).

Two other differences must be noted. The Detroit ordinance was an amendment

to an existing "Anti-Skid Row Ordinance," adding adult establishments to a group of previously regulated uses. The Detroit ordinance did not affect existing establishments but only the location of new ones, while the North Carolina statute affects existing as well as future adult establishments, but allowed a six month grace period between the statute's passage and its effective date. While we do not consider these critically distinguishing, they deserve and are given specific attention in subsequent discussion.

The majority opinion in Mini-Theaters rejected arguments that the Detroit ordinance violated the First Amendment through prior restraint or vagueness, 427 U.S. at 58-63, and then in a four-member plurality opinion, with the concurrence of a fifth justice in the result, rejected arguments that the law violated the First Amendment or equal protection as a classification on the basis of content and a disparate treatment of the resulting classes, id. at 63-73 (plurality opinion of Stevens, J.); id. at 75-76 (Powell, J., concurring). The plurality opinion was apparently premised on the four Justices' findings of a "lesser" First Amendment protection for erotic material, which permits reasonable regulation of such material in furtherance of a legi-

timate government interest.[2] Justice Powell did not reach this issue in his concurring opinion, but indicated that he was not inclined to agree with the plurality's approach,[3] while the four

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2 [E]ven though we recognize that the First Amendment will not tolerate the total suppresion of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate that inspired Voltaire's immortal comment. Whether policial oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice.

427 U.S. at 70.

3 "I do not think we need reach, nor am I inclined to agree with, the holding in Part III (and supporting discussion) that nonobscene, erotic materials may be treated differently under First Amendment principles from other forms of protected expression." Id. at 73 n.1.

dissenting justices emphatically rejected any notion of a diminished First Amendment protection for erotic materials. Id. at 96.

While simply as a matter of stare decisis we consider the holding in Mini-Theatres dispositive of the central issues in these appeals whether the rationale be that of the plurality or of Justice Powell concurring, we prefer to rest our holding on the reasoning employed by Justice Powell. With him, we think that regardless of the level of First Amendment protection to which sexually-explicit publications and films (erotic materials) are entitled, a sufficient justification for any incidental burden produced by the location regulation involved here is provided by an important and substantial state interest under the test in United States v. O'Brien, 391 U.S. 367 (1968). That test sustains a regulation primarily of conduct or non-communicative aspects of protected materials that imposes an incidental burden on expression "[1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on . . First Amendment freedoms is no greater than is essential to the furtherance of that interest." Id. at 377. In Mini-Theatres Justice Powell found that (1) regulation of the location of adult establishments, as of any other businesses, was within the police power, 427 U.S. at 75, 80; (2) such regulation fur-

thered important and substantial state interests in preventing neighborhood deterioration and crime, id. at 80; (3) these interests were directed at secondary effects of concentrated adult establishments and not at suppression of speech, id. at 74-75; and (4) the incidental burden, if any, was no greater than essential because the ordinance was directed only at adult establishments and not at other bookstores and theaters lacking those secondary effects, id. at 82.

We belive that the North Carolina statute also satisfied the O'Brien test. We will first examine the effect of the statute on First Amendment-protected expression, and then consider that effect in light of the other elements of the O'Brien test. In Part III we consider whether the statute impermissibly classifies expression according to its content and treats the resulting classes unequally, in violation of equal protection. The contention that the statute is unconstitutionally vague is discussed in Part IV; and in Part V we consider the claim that it violates the right to privacy.

II

We find the North Carolina statute to be merely a regulation of the place and manner of expression, without proscription of that expression, of the type not forbidden by the First Amendment. See California v. LaRue, 409 U.S. 109, 117 n.4 (1972); Grayned v. City of Rockford, 408 U.S. 104, 115 (1972); Cox v. New Hampshire, 312 U.S. 569, 576 (1941). The essential regulation is of

location. The statute prohibits dissemination of sexually-explicit materials in places where a building or premises is occupied by more than one adult bookstore, adult theater, adult mini-theater, massage parlor, or sexual device vendor. This essentially exhausts the force of the regulation. Dissemination of the affected materials in the myriad of other available locations is not attempted. As both the plurality and concurring opinions in Mini-Theatres agreed in considering the analogous ordinance before that Court: " . . . what is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited," id. at 71 (plurality opinion), because the "ordinance is addressed only to the places at which this type of expression may be presented," id. at 78-79 (Powell, J., concurring). Accord, Northend Cinema, Inc. v. City of Seattle, 90 Wash.2d 709, 585 P.2d 1153, 1158 (1978) (en banc). If it can be thought that there is any further aspect of the regulation, it relates simply to the manner in which the materials may be disseminated. The North Carolina statute, like the Detroit ordinance, is aimed at prohibiting a "supermarket" marketing technique that offers for sale or exhibition at one business location a variety of sexual wares in addition to printed materials. Comparable regulation of specific techniques and methods of commerce in erotic materials has not been thought violative of First Amendment

values.[4]/

So long as protected materials continue to be fully available and public access to them is not substantially impaired, place and manner regulations of this type do not offend the First Amendment. 427 U.S. at 76-78. (Powell, J., concurring). The North Carolina statute, like the ordinance in Mini-Theatres, does not limit the total number of adult establishments or restrict them to any one area; nor does it ban any type of sexually-explicit material. While one district court below found that "a reduction of availability may well occur," U.T. Inc. v. Edmisten, Nos. 77-365 and 77-366, slip op. at 3, (W.D.N.C. July 24, 1978) (Emphasis added), that court did not find a great probability of such reduction, and the other actually speculated that the statute "logically leads to a proliferation of adult-oriented

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[4] See Dover News, Inc. v. City of Dover, 381 A.2d 752, 755-56 (N.H. 1977) (prohibiting offensive storefront displays); Borrago v. City of Louisville, 456 F. Supp. 30, 32 (W.D. Ky. 1978) (same). Cf. Developments in the Law -- Zoning, 91 Harv. L. Rev. 1427, 1562-63 & n.81 (1978) (hours and design regulation of adult establishments would not violate First Amendment).

businesses as existing establishments open branch stores to comply," Hart Book Stores v. Edmisten, 450 F. Supp. 904, 907 (E.D.N.C. 1978). In fact, it is too early to be certain of the long-range effect of the law on availability of these materials to the public. On the record before us, it can only be noted that thus far the adult establishments involved have all apparently opted for compliance rather than closing, so that overall availability of the materials would seem little affected.

The Detroit ordinance upheld in Mini-Theatres actually imposed a greater restraint in many respects than does the North Carolina statutes: Detroit forced dispersal by a 1,000 foot distance rather than simply to adjacent buildings or neighboring premises. Further, it excluded adult establishments from any area already occupied by any two hotels, motels, bars, cabarets, dance halls, pawnshops, poolholls, or shoeshine parlors, while North Carolina does not. Finally, the Mini-Theatres ordinance defined adult bookstores and theaters as those with a "substantial or significant portion" of their materials featuring sexual explicitness, while the North Carolina statute retricts its definition to bookstores and theaters with a "preponderance" of sexually explicit materials. Compare Young v. American Mini-Theatres, Inc., 427 U.S. at 52 n.3,

53-54 n.5 with note 1 supra.[5/]

Both district courts thought it of critical significance that the statute imposed a significant economic burden on the sale or exhibition of erotic materials. See U.T. Inc. v. Edmisten, slip op. at 2; Hart Book Store, Inc. v. Edmisten, 450 F.Supp. at 906. While it is obvious that the First Amendment sets

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5 In addition to Mini-Theatres, other cases have held that analogous regulations do not substantially restrict access to sexually-explicit materials or the availability of such wares. Northend Cinema, Inc. v. City of Seattle, 90 Wash.2d 709, 585 P.2d 1153, 1157 (1978) (en banc) ("[T]here is no evidence that the effect of this ordinance will be a substantial deterrence to protected First Amendment speech. It does not limit the total number of adult theaters which may operate in the City, or significantly inhibit viewers from gaining access to the films."); see Borrago v. City of Louisville, 456 F. Supp. 30, 32 (W.D. Ky. 1978); Note, Using Constitutional Zoning to Neutralize Adult Entertainment -- Detroit to New York, 5 Fordham Urban L.J. 455, 473-74 (1977) (New York regulation "does not restrict or prohibit the content availability of adult entertainment").

limits on the economic burdens that can be imposed upon the dissemination of protected materials, we simply do not find those exceeded by the relocation burden involved here. Zoning and other regulations for the public welfare frequently are an economic detriment to affected businesses; the fact that these carry materials protected by the First Amendment does not exempt them from the consequences of an otherwise valid regulation. Again we find Mini-Theatres dispositive:

> The constraints of the ordinance with respect to location may indeed create economic loss for some who are engaged in this business. But in this respect they are affected no differently from any other commercial enterprise that suffers economic detriment as a result of land-use regulation. The cases are legion that sustained zoning against claims of serious economic damage . . . .
>
> The inquiry for First Amendment purposes is not conerned with economic impact; rather, it looks upon freedom of expression.

427 U.S. at 78 (Powell, J., concurring).[6/]

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6 See also Borrago v. City of Louisville, 456 F.Supp. 30, 31 (W.D. Ky. 1978) ($250 annual license fee and expensive requirement of door attendent to exclude minors); Airport Book Store, Inc. v Jackson, 242 Ga. 214, 218 S.E.2d 623, 625, 629 (1978) ($500 licensing investigation

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Because we conclude that the challenged statute is directed primarily at the noncommunicative aspects of protected expression, with only an incidental effect on expression itself,[7] further analysis under the test in United States v. O'Brien, 391 U.S. 367 (1968) is appropriate. The first question is whether the regulation lies generally within the constitutional powers of the state. On this there can be no doubt that this statute, like the regulation in Mini-Theatres, is "certainly within the concept of the public welfare that defines the limits of the police power." 427 U.S. at 75 (Powell, J., concurring).

(fn. 6 continued)
fee and employment disqualification for convicted felons); Northend Cinema, Inc. v. City of Seattle, 90 Wash.2d 709, 585 P.2d 1153, 1160 (1978) (en banc) (location restriction similar to Mini Theatres) (the "objection, that simply having to move to another location or show a different type of film is substantial economic harm, is unsupported").

[7] We reach the same conclusion, via the same analysis, whether the statute is challenged as a prior restraint, a subsequent restraint, or as an unconstitutional condition, see U.T. Inc. v. Edmisten, slip op. at 4.

Whether or not the statute is a true zoning law,[8] it is a legitimate exercise

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[8] Appellees contend, and both district courts below found, that the challenged statute is not a zoning law, U.T. Inc. v. Edmisten, slip op. at 3; Hart Book Stores, Inc. v. Edmisten, 450 F. Supp. at 906-07. While we do not consider this point crucial to our analysis, we would note that many zoning enactments prohibit the mingling of particular uses in a single building just as the North Carolina statute bars the combination of adult uses in a single building. The Supreme Court sustained under the zoning power an ordinance prohibiting the residential use of a single dwelling by unrelated individuals in Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974), and upheld a regulation proscribing the combined use of a single commercial building for sexually-explicit entertainment and liquor serving in California v. LaRue, 409 U.S. 109 (1972). Many laws prohibit the combination of a residential use and a commercial use of a dwelling; see, e.g., Jamison v. Kyles, 271 N.C. 722, 157 S.E.2d 550 (1967); City of Florence v. Turbeville, 239 S.C. 126, 121 S.E.2d 437 (1961).

Of course it is irrelevant that the challenged exercise of the police power is by a state rather than a municipality, even if it be thought important to qualify the state statute as a "zoning" law

(continued on next page)

of the police power, under which the state may limit the use of private property for the public welfare. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

The next question is whether the regulation furthers an important or substantial interest. We conclude that it does. North Carolina certainly has a substantial interest in maintaining a stable, healthful environment in its cities. The legislature could reasonably have determined that the development of the "total, under one roof" approach to the marketing of sexually explicit materials and devices tended to produce secondary effects destructive of the general quality of life in the neighborhood. While there is no formal legislative history of the law, the record does show that the sponsor of

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(fn. 8 continued)

of the kind considered in Mini-Theatres. Both the general police power, and that aspect of it realized in "zoning" regulations, are reposed originally in the state. State v. Joyner, 286 N.C. 366, 369, 211 S.E.2d 320, 322 (1975); Allgood v. Town of Tarboro, 281 N.C. 430, 437, 189 S.E.2d 255, 260 (1972).

the legislation was concerned to bring these secondary effects to the legislature's attention.[9] A legislative deter-

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[9] The sponsoring senator read to a legislative committee sponsoring the bill a report from the Director of a County Health Department on the results of an inspction of several affected establishments in Wake County:

> They visited five such establishments. At each they saw the usual array of pornographic publications. They found also cubicles or small boothes where patrons enter, deposit a quarter and view assorted salacious films. Certain of the male customers masturbate under the resulting simulation, ejaculating upon the floor and walls. The volume of semen was so considerable by mid-afternoon as to be trickling down the wall to the floor. . . .
>
> Each of the five places checked had such cubicles and film projecting equipment. These numbered from twelve to sixteen.
>
> Though only male customers were seen on this occasion, females are also afforded similar attention. Dildos of every description were available for sale, for use on the premises or for removal therefrom.

(continued on next page)

mination that the dispersal of the marketing activities might ameliorate these secondary effects to some extent, thereby furthering the state's interest, cannot be thought unreasonable. See Airport Book Store, Inc. v. Jackson, 242 Ga. 214, 248 S.E.2d 623, 628-29 (1978).10/

(fn. 9 continued)

Used condoms littered the floors. The use therefor can only be speculated upon.

When questioned about the mess, the operators generally observed that it didn't do much good to clean up; 'Twas soon all to do over again' . . . .

10 Other decisions have found similar location restrictions for adult establishments justified as zoning to serve the legitimate interests in preserving residential neighborhoods and preventing urban decay. Nortown Theatre Inc. v. Gribbs, 373 F.Supp. 363, 369 (E.D. Mich. 1974), rev'd sub nom. American Mini Theatres, Inc. v. Gribbs, 518 F.2d 1014 (6th Cir. 1975), rev'd sub nom. Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (location for regulation necessary for "preservation of neighborhoods"); Northend Cinema, Inc. v. City of Seattle, 90 Wash.2d 709, 585 P.2d 1153, 1156 (1978) (en banc) (sustaining lower court "finding that the location of adult theaters has a harmful effect on the area and contribute[s] to

(Continued on next page)

Closely entwined is the next element of the O'Brien test: whether the state's interest is one unrelated to the suppression of free expression. One district court ruled that the statute failed this requirement of the O'Brien test. That court concluded that "the inescapable inference is that economic harm to plaintiffs' businesses was the primary legislative motive." 450 F. Supp. at 907. We believe that this conclusion misinterprets the O'Brien test. The relevant question under O'Brien is not whether the perceived "legislative motive" for legislation is unrelated to the suppression of free expression, but whether an identifiable "governmental interest" is so unrelated. Indeed the O'Brien Court specifically disavowed any consideration

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(fn. 10 continued)

neighborhood blight"); see Young v. American Mini Theatres, Inc., 427 U.S. at 55 (expert testimony that nearby concentration "encourages residents . . . to move elsewhere); Los Angeles Dept. of City Planning, Study of the Effects of the Concentration of Adult Entertainment Establishments in the City of Los Angeles 5 (City Plan Case No. 26475, City Council File No. 74-4521-S.3, 1977) (hereinafter cited as Effects of the Concentration of Adult Establishments) ("Businessmen, residents, etc. believe that the concentration of adult establishments has adverse effects on . . . the quality of life . . . . Among the adverse effects on the quality of life cited are increased crime; the effects on children; neighborhood appearance, litter and graffiti.").

of the legislative motive: "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." United States v. O'Brien, 391 U.S. at 383. As the Court there observed, in conducting this inquiry, it is best to eschew altogether the "guesswork" of speculating about the motive of lawmakers, for the obvious reasons that many legislators may have different purposes in legislation than the few who are moved to comment on it. Id. at 384.[11] Courts must look in the final analysis to the legislation itself. On its face the challenged statute is a permissible regulation of the external costs of adult establishment that is

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[11] Typical of the dead-end into which such judicial inquiries are likely to lead is the conflicting evidence about the personal motive of the House sponsor of this legislation. His own affidavit stated that he introduced this bill in hope that "the immoral atmosphere and unsanitary conditions described in the health inspector's letter would be less likely to occur." (App. 81). Two newspaper reporters who covered the bill's passage stated in affidavits that the legislator had told them he sponsored the bill because it would cut the profits of adult businesses and probably would drive them out of business. (Jt. App. 82, 84).

unrelated to the overall suppression of any protected materials offered by them for public consumption.[12]

Finally we conclude under the O'Brien test that the incidental restriction on First Amendment interests is no greater than is essential to furtherance of the state's interest. The means chosen by North Carolina in its effort to eliminate the undesired secondary effects of adult establishments appears to be one of the least burdensome means the state could have chosen; indeed it may prove to be totally ineffectual, or as one district court actually predicted, "have a minimal effect on degenerate conduct." 450 F. Supp. at 907. The statute does not go as far in some respects as

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[12] We realize that the histories of this statute and of the Mini-Theatres ordinance differ in that the latter was an amendment to an ordinance that had applied the same restrictions to other regulated uses for ten years prior to the addition of adult establishments to the list. 427 U.S. at 54. We do not, however, find this difference significant; the amendment itself was directed only at adult establishments and could have had the purpose of harming those establishments, but the Court found this not controlling. Id. at 80-81 (Powell, J., concurring).

did the Detroit oridinance. It does not require dispersal of adult activities to a distance of 1,000 feet, but only to an adjacent building. Additionally, the statute is limited in its effect to adult bookstores and theaters, which are the only ones perceived to engender unhealthful conditions. Had the statute included all bookstores and theaters, or all commercial establishments, it might well have been far more restrictive than necessary. See 427 U.S. at 82.

Plaintiffs charge that the statute is too burdensome because it does not exempt existing establishments as did the Mini-Theatres ordinance. It does, however, provide for a six month period before its effective date, 1977 N.C. Sess. Laws ch. 987, § 2. Under well-established principles, this is a sufficient amortization period in view of the termination then of only some and not all erotic material sales in the building or premises. Many valid zoning laws apply immediately to existing uses, e.g., Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), and most take effect after an amortization period against existing establishments, e.g., State v. Joyner, 286 N.C. 366, 375, 211 S.E.2d 320, 325 (1975); see also Art Neon Co. v. City and County of Denver, 488 F.2d 118, 122 (10th Cir. 1973); Northend Cinema, Inc. v. City of

Seattle, 90 Wash.2d 709, 585 P.2d at 1160 (sustaining three month amortization period for adult theater that permitted non-adult theater use thereafter); City of Los Angeles v. Gage, 127 Cal. App.2d 442, 461, 274 P.2d 34, 44-45 (1954) (sustaining termination of commercial use that permitted profitable residential use); None, Using Constitutional Zoning to Neutralize Adult Entertainment -- Detroit to New York, 5 Fordham Urb. L.J. 455, 472-74 (1977) (defending one year amortization period).

Though the particular method chosen by North Carolina may not prove to be effective in eliminating the undesirable spin-off conditions, we cannot say that legislative action is rendered irrational by its choice of a less efficacious and less powerful approach than the Constitution might permit.

III

The district courts below both found that, in addition to the statute's impact on freedom of expression, it impermissibly discriminated between types of bookstores and theaters solely on the basis of the content of their wares. 450 F. Supp. at 904, 908; slip op. at 4. We reject these determinations and find no equal protection violation.

The unequal treatment of commercial establishments involved here is based most essentially on the different effects they are considered to have on their surroundings. See Young v. American Mini-

Theatres, 427 U.S. 50, 82 n.6. Moreover, we believe that a classification by content may be permissible in circumstances such as those involved here where the state has acted to protect other, overriding interests. See e.g., FCC v. Pacifica Foundation, 438 U.S. 726 (1978) (plurality opinion) (upholding ban on nonobscene but "filthy" words on afternoon radio broadcast); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (upholding a prohibition on political, but not commercial, advertising on public transit vehicles); California v. LaRue, 409 U.S. 109 (1972) (upholding proscription of nonobscene erotic dancing or movies in places where liquor was served).

Our conclusion that the statute does not violate equal protection is rested essentially on the same rationale as that which led us to conclude that no First Amendment violation is shown. Because the statute has only an incidental effect on protected expression, First Amendment interests are not directly threatened by the unequal treatment of adult and non-adult establishments, and consequently the classification may be justified if it is rationally related to an important state interest.[13] We will not repeat

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[13] While a classification and unequal regulation involving a suspect class or directly burdening fundamental rights such as fully-protected First

(continued on next page)

our previous discussion of the merely incidental effect on expression and of the state's interest that is furthered

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(fn. 13 continued)

Amendment interests can only be justified if it serves a compelling state interest by the least burdensome means, Dunn v. Blumstein, 405 U.S. 330, 337 (1972); Shapiro v. Thompson, 394 U.S. 618, 634 (1969), such a classification and regulation involving other classes of constitutional rights need only serve a legitimate state interest by rationally related means, City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976); Mc Donald v. Board of Election Commissioners, 394 U.S. 802, 809 (1969). And a classification created by a zoning law is subject to this minimal scrutiny standard, Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974); see Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926), as is a classification made by other police power regulation, McGowan v. Maryland, 366 U.S. 420, 425-27 (1961); see Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974) (plurality opinion). The Mini-Theatres plurality apparently considered that classification of sexually explicit materials would invoke only minimal scrutiny, 427 U.S. at 70-73. Justice Powell in effect applied the same level of scrutiny in his analysis, but did so not because he considered that erotic materials deserved less protection, but because they were not actually suppressed by the zoning ordinance. Id. at 78-80.

by this regulation, but we do give additional consideration in this context to the challenged classification and to its rational relationship to the implicated state interest.

The North Carolina law regulates adult establishments differently from other bookstores and theaters because of the unique external costs of adult enterprises. As Justice Powell wrote in Mini Theatres, "the urban deterioration was threatened, not by the concentration of all movie theaters with other 'regulated uses,' but only by a concentration of those that elected to specialize in adult movies" and publications. 427 U.S. at 82. Such a classification and regulation of different classes on the basis of their different external costs or obtrusive characteristics has been upheld for other classifications touching on speech and press activities such as those involving picketing. See, e.g., Cox v. Louisiana, 379 U.S. 559 (1965) (picketing or parading but not speech prohibited), DeGregory v. Giesing, 427 F. Supp. 910, 915 (D. Conn. 1977) (3-judge court) (only labor picketing prohibited). Cf. Taylor v. City of Chesapeake, 312 F. Supp. 713 (E.D. Va. 1970) (live performances but not speeches and other expression prohibited). Special regulation of one commercial enterprise with particular externalities but not of other enterprises lacking those secondary effects has long been recognized not

to violate equal protection, e.g., Hadacheck v. Sebastian, 239 U.S. 394, 412-14 (1915) (brickmaking); Rosenthal v. People, 226 U.S. 260, 270-71 (1912) (junkyards), precisely because the enterprises are not similarly situated and the different treatment is warranted by the different secondary effects.

Plaintiffs rely upon Police Department of Chicago v. Mosely, 408 U.S. 92 (1972), in which the court invalidated on equal protection grounds an ordinance prohibiting all picketing near schools except labor dispute picketing, for their contention that classifications by content of speech are never permissible. Brief of Appellees at 26, 27. This broad principle, however, has been qualified many times; see, e.g., Greer v. Spock, 424 U.S. 828, 831, 838-39 (1976); Rowan v. United States Post Office Department, 397 U.S. 728, 735-38 (1970); Cox v. Louisiana, 379 U.S. 559, 563-64 (1965). Moreover, Mosely involved unequal treatment of speech occurring in a public forum, where speakers are necessarily similarly situated and no governmental interest justified the unequal treatment; it was based solely on the content of the speech.

The classification bears a rational relationship to the state interest earlier identified. One of the district courts did not agree on this critical point because "[a]t best, the means chosen . . . would have a minimal effect

on degenerate conduct" and at worst it would cause "a proliferation of adult-oriented businesses." Hart Book Stores, Inc. v. Edmisten, 450 F. Supp. at 907. But a legislative approach need simply be rationally related to the state objective when enacted, and need not have proved efficacious from the retrospective vantage point of a reviewing court. For example, in Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), a zoning limitation on multiple family habitation in a single dwelling that was not proved effective in relieving urban congestion and noise and advancing family values and clean air, was yet found rationally related to those state interests, id. at 8.

In concluding that the rational relation between state interest and means of regulation required to support the classification was not present the district courts were also apparently greatly influenced by the dearth of hard evidence before the legislature that the interest was indeed threatened or that the means chosen to protect it would work. In this, we think they insisted on a showing that need not be made in order to uphold legislative efforts to deal with a problem within reach of the police power. In Mini-Theatres itself, the fact that the legislative body had before it the testimony of a single expert concerning the effect of adult businesses on neighborhoods, Nortown Theatre Inc. v. Gribbs, 373 F. Supp. at 365, was not thought to draw in question the rationality of the legislative decision to

attempt regulation in the particular way chosen. As the Supreme Court pointed out in Paris Adult Theatre I v. Slayton, 413 U.S. 49, 61 (1973): "From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions," and "[n]othing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data." Furthermore, in judicial assessments of the rationality of legislative means chosen to advance state interests, government "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." Mini-Theatres, 427 U.S. at 71. The very disparity of legislative approaches in various jurisdictions to regulating the kind of commercial enterprise involved here and the lack of a long record of regulatory efforts underscores the need for a chance for reasonable experimentation. See F. Strom, Zoning Control of Sex Businesses 53, 57, 62, 65, 71 (Boston: concentration of adult establishments; Chicago: dispersal; Oakland: dispersal; Indianapolis: special exception); Northend Cinema, Inc. v. City of Seattle, 90 Wash.2d 709, 585 P.2d 1153 (1978) (Seattle: concentration).

Finding no violation of equal protection rights, we decline to invalidate North Carolina's effort to cope with a problem of commercial regulation under its police power simply because it treats those establishments that are perceived to have undesirable external effects differently from those that do not.

IV

Next we consider appellee's contention that the statute is unconstitutionally vague. We reject this claim at the outset because it is apparent that under Young v. American Mini-Theatres, 427 U.S. 50, appellees lack standing to raise it. The statute's terms clearly apply to appellees, all of whom stock at least a preponderance of sexually-oriented materials in their establishments. The fact that they have had to change their method of operation since the statute's effective date, see Brief of Appellees at 50, only confirms their understanding of the statute's effect and does not aid them in their vagueness claim.

In Mini-Theatres, a majority of the Supreme Court (Justice Powell joined in this portion of the opinion) held that, because the ordinance there clearly applied to them, the respondent adult theaters did not have standing to challenge the ordinance for vagueness. The majority agreed that the usual concerns that permit litigants who are not affected by vagueness in a law touching expression to raise the claim on behalf of others possibly affected are not present when sexually-explicit materials are at issue:

> Since there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance,

> and since the limited amount of uncertainty in the ordinance is easily susceptible of a narrowing construction, we think this is an inappropriate case in which to adjudicate the hypothetical claims of persons not before the Court.

Id. at 61.[14/] Accord, FCC v. Pacifica Foundation, 438 U.S. 726, 743 (1978). We find, on the record before us, that appellee adult establishments clearly come within the statutory terms and so lack standing to challenge them for vagueness.

Furthermore, we believe that even were appellees granted standing to raise this issue, the statute would withstand a vagueness challenge. One district court below found vagueness in the North Carolina statute's reference to publications or films distinguished by their "emphasis" on sexual explicitness and to multiple adult establishments in a single "building, premises, structure or other facility." U.T. Inc. v. Edmisten, slip op. at 5. Plaintiffs also allege vagueness in the definition of "adult bookstores," "adult . . . theaters," and "adult . . . mini theaters"; the reference to a "preponderance" of the books or films in such establishments; the reference to material "depicting, describing or relating to" sexual explicitness; and the use of "distinguished or characterized by their emphasis" on

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14 For the same reasons, the Court declined to apply the First Amendment doctrine of overbreadth, id. at 59-60 & n.17.

sexual explicitness, used in the Mini Theatres ordinance, has been sustained in Nortown Theatre Inc. v. Gribbs, 373 F. Supp. 363, 367 (E.D. Mich. 1974), rev'd sub nom. American Mini Theatres, Inc. v. Gribbs, 518 F.2d 1014 (6th Cir. 1975), rev'd sub nom. Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976); Northend Cinema, Inc. v. City of Seattle, 90 Wash.2d 709, 585 P.2d 1153, 1157 (1978) (en banc). The terms "depicting, describing or relating to" specified sexual activities and areas, also used in the Mini Theatresenactment, has been upheld over vagueness challenges in Miller v. California, 413 U.S. at 24; Nortown Theatre Inc. v. Gribbs, 373 F. Supp. at 367; Northend Cinema, Inc. v. City of Seattle, 90 Wash.2d 709, 585 P.2d at 1157. The reference to the "predominant" character of publications or films has been sustained in Ward v. Illinois, 431 U.S. 767, 770-73 (1977); is like the "dominant theme" test in Roth v. United States, 354 U.S. 476, 489 (1957); and is certainly less vague than the "substantial or significant portion" phrase, used in the Mini Theatres ordinance, and upheld in Nortown Theatre Inc. v. Gribbs, 373 F. Supp. at 367; Airport Book Stores, Inc. v. Jackson, 242 Ga. 214, 248 S.E.2d at 625 n.1, 626 n.3, 629. The definitions of "adult bookstores," "adult . . . theaters," and "adult . . . mini theaters" are not vague because their component elements are not. Finally, the meaning of "building, premises, structure or other facility" is reasonably definite. Any ambiguity in the meanings of these terms as applied is, as the

Supreme Court majority held in Mini Theatres, "'readily subject to a narrowing construction by the state courts.'" 427 U.S. at 61; see, e.g., Ward v. Illinois, 431 U.S. at 773-76; Ginsberg v. New York, 390 U.S. 629, 643 (1968).

Additionally, because this adult establishment law carries a criminal penalty, we are confident that the state courts will construe it to require scienter for its violation by adult establishment proprietors, in the sense of knowledge or reasonable awareness of the sexually-explicit content of a store's predominant wares and of the existence of other adult material or sexual device sales in the same building or premises. See Smith v. California, 361 U.S. 147 (1959); Grove Press, Inc. v. Flask, 326 F. Supp. 574, 578 (N.D. Oh. 1970), vacated on other grounds, 413 U.S. 902 (1973).

V

Finally, we consider Appellees' contention that the North Carolina statute violates the constitutionally protected right of privacy.

The statute prohibits the sale of "sexually oriented devices" in the same building or premises as adult bookstores, theaters, mini-theaters, or massage parlors. We assume for purposes of this discussion that the term "sexually oriented devices" would apply to contraceptives, although we recognize the possibility of a state court construction of the term to exclude contraceptive

devices.

One district court below concluded that the North Carolina statute "violates the right of privacy since it seeks to ban the sale of prophylactic devices in places where primarily sexually oriented books are sold," citing Carey v. Population Services International, 431 U.S. 678 (1977). U.T. Inc. v. Edmisten, Nos. 77-365 and 77-366, slip op. at 5 (W.D. N.C. July 24, 1978). But Carey v. Population Services International involved a law placing a substantial burden on access to nonmedical contraceptives because it prohibited anyone except licensed pharmacists from selling them, 431 U.S. at 686, 689. The statute challenged here, on the other hand, does not burden access to contraceptive devices, because it restricts their sale in only one place (i.e., buildings containing adult establishments) rather than prohibiting their sale in any place but one (i.e., licensed pharmacies) and this does not significantly restrict access to contraceptives in all the other places where they are more commonly sold. We see no reason why North Carolina cannot prohibit the sale of contraceptives along with other sexual devices in adult establishments, because the resulting restriction upon general access to them cannot sensibly be thought significant.

VI

In practical terms this statute may well be revealed as yet another essential

failure in the ancient, essentially unequal struggle to contain various social side-effects of the commercial exploitation of human sexuality. An omniscience that could plumb the depths of the many strands of motivation behind this particular effort would undoubtedly reveal much of questionable social and philosophical insight as to both ends and means. Our concern is not, however, with questions of the practical ineptitude of legislation nor even with the possibility of its sheer silliness or assininity in a social or philosophical sense, see Griswold v. Connecticut, 381 U.S. 479, 527 (1965) (dissenting opinion), but with whether it violates specific rights secured by the Constitution.

Finding no violation of the constitutional rights invoked here, we reverse the judgments of the district courts.

REVERSED.

APPENDIX A-2

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 78-1461

Hart Book Stores, Inc., et al,
Appellees,

versus

Rufus Edmisten etc., et al,
Appellants.

No. 78-1706

U. T. Incoporated, etc., et al,
Appellees,

versus

Rufus Edmisten, etc., et al,
Appellants.

O R D E R

Upon consideration of the appellees' petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Phillips for a panel consisting of Judge Widener and Judge Breitenstein.

For the Court,
/s/ William K. Slate,II
CLERK

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

C-C-77-365)
U. T. INCORPORATED,)
etc., Plaintiff,)
)
-vs-)
)
RUFUS EDMISTEN, etc.)
et al., Defendants,)
)
and) JUDGMENT
)
C-C-77-366)
MIND'S EYE, INC.,)
etc., Plaintiff,)
)
-vs-)
)
RUFUS EDMISTEN, etc.)
et al., Defendants.)

In accordance with the findings of fact and conclusions of law filed simultaneously with this judgment,

IT IS HEREBY ORDERED,ADJUDGED AND DECREED that House Bill 961, codified as N.C.G.S. §§14-202.10 to .12 and titled "An act to regulate the number of adult establishments in any one building," is declared unconstitutional.

This 21 day of July, 1978.

/s/ James B. McMillan
James B. McMillan
United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

C-C-77-365
U.T. INCORPORATED, etc., Plaintiff,

-vs-

RUFUS EDMISTEN, etc. et al., Defendants,

and

C-C-77-366
MIND'S EYE, INC., etc., Plaintiff,

-vs-

RUFUS EDMISTEN, etc. et al., Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. A hearing was conducted in these cases on January 25, 1978. The parties have stipulated that the cases shall be decided on their merits based on this hearing.

2. Plaintiffs are corporations. Mind's Eye, Inc., operated a book store in Charlotte, North Carolina, known as the Mind's Eye No. 1, and a book store in Hickory, North Carolina, known as

the Imperial Book Store. U. T. Incorporated operates a book store in Gastonia, North Carolina, known as the Camera's Eye Book Store.

3. Defendants are Rufus Edmisten, the Attorney General of North Carolina, Peter Gilchrist, District Attorney for the Twenty-Sixth Judicial District, which includes Charlotte, North Carolina; Donald Greene, District Attorney for the Twenty-Fifth Judicial District, which includes Hickory, North Carolina; Joseph Brown, District Attorney for the Twenty-Seventh Judicial District, which includes Gastonia, North Carolina; and C. C. Elmore, the Chief of Police of the City of Gastonia, North Carolina.

4. Plaintiffs operate book stores which sell sexually oriented books, devices, and magazines, and exhibit motion picture film. All of these activities take place within the same building. There is no evidence or contention that the stores do not comply with applicable zoning requirements.

5. On July 1, 1977, the North Carolina Legislature passed House Bill 961, "An act to regulate the number of adult establishments in any one building." The act became effective January 1, 1978. Defendants stated that the object of the statute is to require the exhibition of sexually oriented film, the sale of sexually oriented books, and the sale of sexually oriented devices, to take place in different buildings; they also contended that the statute would not

appreciably affect the availability of sexually oriented material.

6. Under the act, no store which sells books, most of which are sexually oriented, may exhibit film if most of the film is sexually oriented. The act provides: "No building, premises, structure, or other facility that contains any adult establishment shall contain any other kind of adult establishment. No building, premises, structure, or other facility in which sexually oriented devices are sold, distributed, exhibited, or contained shall contain any adult establishment."

7. Because the plaintiffs' stores sell sexually oriented books and exhibit sexually oriented films, they are targets of this statute. Defendants have stated their intention to enforce the statute fully and promptly against the plaintiffs.

8. If the plaintiffs were compelled to abandon the exhibition of sexually oriented motion pictures in their establishments altogether, this would reduce their gross revenue by approximately one-third, at least. Abandonment of the sale of sexually oriented books would cause an even greater reduction in gross revenue. Affidavits from corporate accountants tend to show that abandonment of the sale of either group of sales, all other things remaining equal, would tend to make the Camera's Eye Book Store in Gastonia and the Mind's Eye No. 1 Book Store in Charlotte unprofitable.

9. The defendants contend that the statute would not reduce the availability

or variety of sexually oriented materials. However, there is no evidence to support the defendants' contention. The plaintiffs' evidence shows that a reduction of availability may well occur.

10. Defendants contended that the statute could be justified both as an innovative land use technique designed to improve the quality of life and as a regulation of offensive sexual conduct.

11. Defendants offered no competent evidence whatever. There is no evidence from which the court can find that the statute can be justified as an improvement in the quality of life or as an innovative land use technique. There is nothing before the court to justify the conclusion that the quality of life would be appreciably improved by the regulatory scheme established by the statute.

12. There is no competent evidence before the Court on the question of sexual conduct. The statute is not aimed at such conduct (as opposed to expression) and there is no evidence from which the court can find the statute will have any effect on conduct.

13. The statute represents a substantial burden on the plaintiffs' First Amendment rights; it substantially increases the overhead costs of their stores; it interferes with the plaintiffs' right to choose the types of materials protected by the First Amendment which they carry and sell or exhibit in their stores; it cannot be justified as a "zoning ordinance" or an innovative land use

regulation", since it does not in any way affect the location or concentration of the stores selling sexually oriented material. It affects existing establishments.

14. Plaintiff Mind's Eye sold sexual devices including contraceptives prior to the enactment of the statute. After the enactment of the statute, it ceased sales of these devices but wishes to resume the sale of them.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the court concludes as a matter of law:

1. The statute in the present case is not directed toward or aimed at the elimination of obscene or unprotected speech. It reaches speech protected by the First and Fourteenth Amendments to the United States Constitution.

2. By requiring the exhibition of film (most of which is sexually oriented) to take place in a different establishment from the sale of books (most of which are sexually oriented), the statute imposes a substantial burden on the plaintiffs' exercise of their First Amendment rights. It conditions the right to exhibit constitutionally protected sexually oriented movies on the abandonment of the right to sell constitutionally protected but primarily sexually oriented books in the same building. This limitation on the exercise of constitutional rights is not justified by any substantial

or compelling state interest. The same is true with respect to the sale of contraceptive devices.

3. The statute denies to the plaintiffs equal protection of the laws in violation of the Fourteenth Amendment, since it discriminates against a class of book sellers based on the sexually oriented content of the material which they sell. This discrimination is not justified by any substantial, important or compelling governmental interest. No evidence has been offered to supply even a rational basis for the difference in treatment established by the statute.

4. The statute constitutes an invalid prior restraint on expression, since it seeks to ban the sale of an entire class of books in certain locations (those exhibiting primarily sexually oriented motion picture film) simply on the basis of the content and number of the books involved. It attempts to establish this restraint without regard to whether or not the books are constitutionally protected by the First Amendment and without regard to the question whether or not the store would otherwise be an appropriate place for the sale of such books or the exhibition of such film. It conditions or limits the place for exercise of protected expression without proof of any substantial state interests in such conditions or limitations. The effect of the statute is to make protected expressions criminal in plaintiffs' establishments.

5. The statute is unconstitutionally vague and violates the First and

Fourteenth Amendments to the United States Constitution. It requires the plaintiffs to determine, at peril of criminal prosecution, whether their books and films "emphasize" sexual matters and provides no precise guideline as to how much "emphasis" is to be determined. The act is unconstitutionally vague since it provides no clear definition of the location in which simultaneous "adult establishments" are proscribed. It attempts to proscribe these in any "building, premises, structure, or other facility . . . ." The statute chills, by criminal penalties, expression protected by the First and Fourteenth Amendments.

6. The statute violates the right of privacy since it seeks to ban the sale of prophylactic devices in places where primarily sexually oriented books are sold Carey v. Population Services International, 431 U.S. 678 (1977).

7. The statute reaches existing establishments, including those of the plaintiffs. Any form of compliance with the statute available to the plaintiffs would represent a significant and unconstitutional burden on their First Amendment rights, a burden not justified by any substantial, compelling, or important governmental interest.

Although neither case is controlling here, the decision of the Supreme Court in Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (Powell, J., concurring, and Stewart, Brennan, Marshall and Blackmun, JJ., dissenting) and the decision of the Honorable F. T. Dupree,

Jr. in Hart Book Stores, Inc. v. Edmisten, No. 77-387-CIV-5 (E.D.N.C. April 12, 1978) (holding unconstitutional the same statute that is the subject of this case) are consistent with the ruling in this case.

This 21st day of July, 1978.

/s/ James B. McMillan
James B. McMillan
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH AND FAYETTEVILLE DIVISIONS

HART BOOK STORES, INC., et al., Plaintiffs, vs. RUFUS EDMISTEN, etc., et al., Defendants. — NO. 77-387-CIV-5

TRI-STATE NEWS, INC., et al., Plaintiffs, vs. RUFUS EDMISTEN, etc., et al., Defendants. — NO. 77-388-CIV-5

ROGER FEHLHABER, d/b/a ADULT BOOK STORE, et al., Plaintiffs, vs. EDWARD W. GRANNIS, JR., et al., Defendants. — NO. 77-76-CIV-3

LARRY GENE MOORE, d/b/a E & M ENTERPRISES, Plaintiffs,

vs. RUFUS EDMISTEN, et al., Defendants. — NO. 78-14-CIV-5

THOMAS PAGE, d/b/a PLAYERS BOOK STORE, et al., Plaintiffs, vs. RUFUS EDMISTEN, et al., Defendants. — NO. 77-397-CIV-5

CAMERA'S EYE, INC., Plaintiff, vs. RUFUS EDMISTEN, et al., Defendants. — NO. 78-01-CIV-5

J U D G M E N T

The court hereby declares 1977 House Bill 961, codified as N.C.G.S. §§ 14-202. 10 - 202.12, entitled "An Act to Regulate the Number of Adult Establishments in Any One Building" facially unconstitutional, in violation of the First and Fourteenth Amendments to the United States Constitution.

/s/ F. T. Dupree, Jr.
F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

April 12, 1978.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH AND FAYETTEVILLE DIVISIONS

HART BOOK STORES, INC., et al., Plaintiffs,
vs. NO. 77-387-CIV-5
RUFUS EDMISTEN, etc., et al., Defendants.

TRI-STATE NEWS, INC., et al., Plaintiffs,
vs. NO. 77-388-CIV-5
RUFUS EDMISTEN, etc., et al., Defendants.

ROGER FEHLHABER, d/b/a ADULT BOOK STORE, et al., Plaintiffs,
vs. NO. 77-76-CIV-3
EDWARD W. GRANNIS, JR., et al., Defendants.

LARRY GENE MOORE, d/b/a E & M ENTERPRISES, Plaintiffs,

vs. NO. 78-14-CIV-5
RUFUS EDMISTEN, et al., Defendants.

THOMAS PAGE, d/b/a PLAYERS BOOK STORE, et al., Plaintiffs,
vs. NO. 77-397-CIV-5
RUFUS EDMISTEN, et al., Defendants.

CAMERA'S EYE, INC., Plaintiff,
vs. NO. 78-01-CIV-5
RUFUS EDMISTEN, et al., Defendants.

MEMORANDUM OF DECISION

Plaintiffs in this consolidated action challenge the constitutionality of 1977 House Bill 961, codified as N.C.G.S. § 14-202.10 - 202.12, "An Act to Regulate the Number of Adult Establishments in Any One Building." A hearing was conducted in these cases on February 8, 1978. The parties have stipulated that the cases shall be decided on their merits based on this hearing; defendants conceded at oral argument that all plaintiffs are sufficiently threatened by prosecution under the Act to have standing and that abstention, save in the case of plain-

tiff Fehlhaber in No. 77-76-Cir-3, is not required. A complete listing of the plaintiffs and defendants is found at defendants' proposed findings of fact Nos. 2 and 3, which are herein incorporated.

On July 1, 1977 the North Carolina Legislature passed House Bill 961, "An Act to Regulate the Number of Adult Establishments in Any One Building." The Act became effective January 1, 1978 and was codified in the criminal law chapter of the North Carolina General Statutes at N.C.G.S. §§ 14-202.10 through 14-202.12.

The Act provided: "No building, premises, structure, or other facility that contains any adult establishment shall contain any other kind of adult establishment. No building, premises, structure, or other facility in which sexually oriented devices are sold, distributed, exhibited or contained shall contain any adult establishments." N.C.G.S. §14.202.11. "Adult establishment" includes "adult bookstore," "adult motion picture theatre," "adult mini-motion picture theatre" and "massage business," as defined in N.C. G.S. §§ 14-202.10(1), (2), (3), (4) and (6). To constitute an "adult" bookstore or theater, the "preponderance" of the material offered for sale or display in the establishment must be distinguished or characterized by an "emphasis" on matter which has to do with "specified sexual activities" or "specified anatomical areas" as defined in the statute. Violation of the section

of the statute which prohibits any adult establishment from being contained in the same building as another adult establishment, or from being in the same building where sexually oriented devices are sold, distributed, exhibited or contained, is a criminal misdemeanor and may result in punishment of a three-month term of imprisonment, a fine up to $300.00, or both for a first offense, and a six-month prison sentence, a fine not to exceed $500.00, or both for subsequent convictions. N.C.G.S. § 14-202.12.

Plaintiffs assert that the statute falls short of a number of constitutional standards: that it violates equal protection, chills the exercise of protected expression, constitutes an invalid prior restraint, impermissably omits a scienter requirement, infringes on the right to privacy and is void for vagueness. Only the equal protection claim will be resolved, as the court thinks it clear that defendants have provided insubstantial justification for the significant intrusion the statute makes into businesses that choose to deal in sexually-oriented yet constitutionally protected materials.

The statute regulates the distribution of books and movies that share a common orientation but admittedly are not all individually obscene. Thus they are entitled to undiluted First Amendment protection. Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), (Powell, J., concurring, and Stewart,

Brennan, Marshall and Blackmun, J.J., dissenting). Unlike the ordinance in Young, which gave zoning exceptions to existing establishments, the statute here requires bookstore and theater owners with substantial investments in their current buildings and modes of operation radically to alter their manner of doing business. The infringement of First Amendment interests is substantial, and it is incumbent on defendants to establish a compelling justification.

At the outset the court notes that the rationale employed by Justice Powell in his Young concurrence to sustain the ordinance there is not available to defendants.[1] This is not a

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1. A proper understanding of Justice Powell's concurring opinion in Young is crucial to the resolution of this case. Four justices there thought the regulation of speech based on its sexually-oriented content was permissible; four dissenters sharply disagreed. Justice Powell concurred in upholding the validity of the statute, but on the theory that it was a neutral zoning ordinance with minimal effect on First Amendment rights. He agreed with the dissenters on the proposition that non-obscene but sexually-oriented speech is fully protected by the First Amendment. Young, supra, at 73, Footnote 1 (Powell, J., concurring).

zoning case "presenting an example of innovative land-use regulation, implicating First Amendment concerns only incidentally and to a limited extent." Young, supra, at 73. "Zoning . . . connotes a non-particularized legislative process in which rules are promulgated and land areas designated on a general, prospective basis." Bayou Landing, Ltd. v. Watts, 563 F.2d 1172, 1175 (5th Cir. 1978). In essence it is the geographical placement of various uses based on their effect on the surrounding environment. Such was the case in Detroit, where an historic anti-skid row ordinance geographically dispersing pool halls, used furniture stores and the like throughout the city was amended to include adult-oriented establishments. Justice Powell relied on the broad powers of a municipality to regulate land use to sustain the ordinance; critical to his resolution of the issue was the fact that:

> "It is clear both from the chronology and from the facts that Detroit has not embarked on an effort to suppress free expression. The Ordinance was already in existence, and its purposes clearly set out, for a full decade before adult establishments were brought under it. When this occurred, it is clear - indeed it is not seriously challenged - that the governmental interest prompting the inclusion in the ordinance of adult establishments was wholly unrelated to any suppression of free expression." Young, supra, pp. 80-81.

This statute bears no resemblance to a land-use regulation. It allows adult establishments to exist wherever the proprietors choose, whether side by side or widely distributed. Instead, it regulates the types of merchandise available in such a place. No other types of establishments with arguably similar deleterious effects on the environment come within its parameters; unlike most zoning ordinances, it aims directly at existing businesses rather than giving them the traditional exemption.

Even if generously classified as a land-use regulation, the statute fails the four-part test of United States v. O'Brien, 391 U.S. 367 (1968), relied on by Justice Powell. Arising out of no historical context other than that of extreme legislative distaste for the establishments sought to be regulated, and affecting no enterprises other than those, the court could not conclude that the governmental purpose here is unrelated to suppression of free expression. As will later appear more clearly, the inescapable inference is that economic harm to plaintiffs' businesses was the primary legislative motive.

Defendants argue their interest in "the quality of life and the total community environment, [and] the tone of commerce in the . . . city centers. . . ." Paris Adult Theatre I v. Slaton, 413 U.S. 49, 58 (1973). An affidavit of Dr. Millard Bethel, Director of the Wake County Department of Public Health, detailing evidence of sexual conduct of patrons in businesses like plaintiffs, has been given much

weight by defendants in establishing the compelling need in the statute. The conduct described there is repulsive, and presumably violative of existing statutes criminalizing public sexual acts. The unclear question is how this statute would affect it.

With due deference, the court fails to perceive a rational relationship between the worthy goal of improving community tone and this statute. At best, the means chosen by the legislature would have a minimal effect on degenerate conduct that now allegedly occurs within some adult-oriented establishments. Even this requires acceptance of the dubious logic that the stimulation provided by an adult movie is enhanced by having passed by a rack of similarly-oriented books on the way into the theater, an assumption unsupported by the record. In exchange for this indirect and conjectural regulation of conduct, the statute logically leads to a proliferation of adult-oriented businesses as existing establishments open branch stores to comply. It is contrary to common experience to assume that the tone of the inner city is improved when a moviehouse and bookstore formerly operated as an entity expand into an additional storefront to move into statutory compliance.

The regulation of adult businesses has spawned much controversy in recent years. Some municipalities have required all to be located in a central district, while other cities, like Detroit, strive for a precisely opposite result. A rational argument

for either view in relation to the goal of protecting the community environment can be made. North Carolina follows neither approach. Adult-oriented businesses may aggregate into skid rows or disperse through the suburbs. The statute only suggests an increased number of outlets, at some expense to First Amendment freedoms, and in furtherance of no permissible state purpose. Thus the court is unable to conclude that the purported justification is sufficiently substantial to outweigh the First Amendment rights involved. The firm conclusion persists that the statute is a thinly-veiled attempt to harm plaintiffs' businesses by cutting their individual profit margins. This is not the even-handed treatment the equal protection clause requires.

North Carolina is not without weapons to regulate the businesses that are the aim of this statute. Vendors of obscene materials may be criminally punished; patrons who violated common standards of decency are misdemeanants; sanitary standards may be enforced by the public health authorities. Adult businesses that sell books or show movies may be treated as nuisances, forced to pay damages, and have their leases voided; within constitutional limits, they may be enjoined from continuing. Massage parlors may be regulated to the extent of prohibiting heterosexual massage. All of these steps are available to defendants. However, the state may not limit the activities of bookstores and movie houses that choose to deal in sexually-oriented

materials, many of which are not obscene, in a manner that serves no apparent purpose except to stiffle constitutionally-protected expression.

In addition to the foregoing, the court expressly adopts and incorporates by reference plaintiffs' consolidated proposed findings of fact Nos. 4, 10, 11, 12, 14, 15, 16, 17 and 18.

For the foregoing reasons, the court concludes that the statute in question is offensive to the First and Fourteenth Amendments to the United States Constitution, and that plaintiffs (with the exception of Fehlhaber in No. 77-76-Civ-3)[2] are entitled to a declaratory judgment so holding.[3] An order of judgment will enter accordingly.

/s/ F. T. Dupree, Jr.
F.T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

April 12, 1978.

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2. Whether this judgment will also run in favor of plaintiff Fehlhaber will be determined upon receiving the advice of counsel of the exact status of the state prosecution that was earlier pending against him.

3. This result accords with the conclusion of Judge McMillan of the Western District in construing the same statute.

PLAINTIFFS' CONSOLIDATED PROPOSED FINDINGS OF FACT WHICH WERE ADOPTED BY JUDGE DUPREE

4. At the time the complaints were filed, Plaintiffs all operated businesses through which sexually explicit books, magazines, periodicals and motion pictures, of the type colorably within the definitions of the legislation here at issue, were offered for sale and display under the same roof. All of the Plaintiffs further offered for sale in their businesses devices of a sexual nature, including contraceptive devices, of the type colorably within the definitions of the legislation. When the complaints were filed all of the Plaintiffs' businesses primarily offered for sale and display books, magazines, periodicals and motion pictures of a sexually explicit nature, so as to colorably be covered by the challenged act. The Plaintiff Moore, additionally, in the Boulevard Book Store and Massage, is the only Plaintiff with a business which provides body massages to customers where sexually explicit books, magazines, periodicals, motion pictures and devices of a sexual nature are also offered for sale and display under the same roof. All customers and patrons of each of the Plaintiffs' businesses are required to be adults and must verify their ages prior to being permitted to enter the premises, with the exception of Raleigh Book Stores, Inc. where a front section of the store is open to the general public and a back section selling sexually explicit material, is restricted to adults.

10. After the statute became effective, in order to avoid prosecution, Hart Books, Tri-State, Raleigh Books, and Frye all acquired enough non-sexually oriented books to outnumber their sexually oriented publications. All of them abandoned the sale of sexually oriented devices which in Raleigh Books, Inc., and Tri-State News, Inc., included the sale of prophylactics. All of these Plaintiffs object to carrying (as over half of their publication inventory) non-sexually oriented books. This necessity has restricted their ability to sell and display sexually oriented publications since much of their sales space is now devoted to non-sexually oriented books. All have had the expense of acquiring and maintaining an inventory of non-sexually oriented books. All would like to resume the sale of sexual devices. Plaintiff Frye has had difficulty in obtaining non-sexually oriented books since the major magazine-newspaper and book distributor in his area is reluctant to provide materials to adult bookstores. Plaintiff Hart Book Stores, Inc., when it purchased non-sexually oriented books in its store (to bring it into compliance with the law) had to avoid the book Fanny Hill and similar books which emphasize sexual matters.

11. Raleigh Books, Inc., has always sold ordinary paperback books and magazines of the sort available on any newsstand, together with books and magazines which are primarily sexually oriented. Since the passage of the statute, Raleigh Books, Inc., has had to

try to avoid carrying too many for fear of "tipping" its inventory and being found in violation of the law. It is concerned that its scrutiny of these books may not be completely successful and that it may be prosecuted in any case. In addition, it would like to be able to carry books from major publishers without worrying about whether or not they would be considered to emphasize sexual matters.

12. The effect of the statute is to require the Plaintiffs (so long as they exhibit primarily sexually oriented films) to carry certain categories of books, and to refrain from carrying others, at least in certain numbers, as a condition of being permitted to sell sexually oriented books which are protected by the First Amendment to the United States Constitution.

14. The Defendants contended that the statute can be justified as an innovative land use technique designed to improve the quality of life. The Defendants provided no evidence on the subject. There is no evidence that the stores do not comply with applicable zoning requirements or otherwise affect the quality of life in their communities.

15. Defendants also justified the statute as regulation of sexual conduct. They offered a letter written by the Director of the Wake County Health Department addressed to Senator I. Beverly Lake, Jr. Under the stipulation by the parties this letter, if relevant,

can be considered solely on the issue of legislative motivation, but not to prove the truth of the matters asserted in it. The Defendants also introduced an affidavit from State Representative James Morgan, the Sponsor of the bill, the admission of which was also limited to the question of legislative motivation.

16. On the issue of legislative motivation, the Plaintiffs offered affidavits from newspaper reporters quoting statements of Representative Morgan (the sponsor of the bill) during the House Judiciary Committee discussion of House Bill 961. The substance of these statements was that the object of the statute was to make adult businesses less financially attractive and consequently to drive them out of business.

17. Defendants offered no evidence whatever from experts or otherwise to show that House Bill 961 would affect sexual conduct or would improve or enhance the quality of life. There is nothing before the Court to justify the conclusion that the quality of life would be appreciably improved by the regulatory scheme established by the statute.

18. The statute is not aimed at sexual conduct (as opposed to expression) and there is no evidence from which the Court can find that the statute will have any effect on sexual conduct. Defendants' evidence tending to show that the statute was aimed at sexual conduct (even if relevant) cannot save the statute since there is no

reason to believe that the statute will affect sexual conduct. Even if the statute were aimed at sexual conduct (as opposed to being aimed at certain types of expression) regulation of conduct could be more narrowly achieved without interference with First Amendment rights.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1352

HART BOOK STORES, INC., et al.,
Petitioners

V.

RUFUS EDMISTEN, et al.,
Respondents.

RESPONSE TO PETITION FOR CERTIORARI

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is not yet reported and is reproduced as Appendix A-1, with the Order denying rehearing reproduced as Petitioners' Appendix A-2.

The opinion of the United States District Court for the Eastern District of North Carolina is reported as 450

F. Supp. 904 (E.D.N.C. 1978) and is reprinted as Petitioners' Appendix C.

The opinion of the United States District Court for the Western District of North Carolina is unreported. The Court's Memorandum of Decision and Findings of Fact and Conclusions of Law are reprinted as Petitioners' Appendix B.

JURISDICTION

The jurisdiction of the Court has been invoked under 28 U.S.C. §1254(1) and 28 U.S.C. §2101(c).

QUESTIONS PRESENTED

I. Do the North Carolina State Statutes which prohibit the simultaneous sale of predominantly sexually oriented publications and the exhibition of predominantly sexually oriented motion picture films in the same building, premises or structure violate the First and Fourteenth Amendments to the United States Constitution because they deprive such stores, their customers, and those producing sexually oriented materials freedom of speech and freedom of the press in violation of the First and Fourteenth Amendments to the United States Constitution and also deprive them of other Constitutional rights as the price for exercising First Amendment rights?

II. Is the statutory scheme unconstitutional because it deprives the bookstores of Equal Protection of the laws in violation of the Fourteenth Amendment to the United States Constitution?

III. Is the statutory scheme unconstitutionally vague in violation of the First and Fourteenth Amendments to the United States Constitution because it proscribes the simultaneous sale of sexually oriented books and the exhibition of sexually oriented movies in the same "building, premises, structure or other facility . . . " based on whether or not most of the constitutionally protected material is "distinguished or characterized by an emphasis on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas. . ."?

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

AMENDMENT I.

Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

NORTH CAROLINA STATUTORY PROVISIONS INVOLVED

North Carolina General Statutes §§14-202.10 through 14-202.12 (cum. supp. 1979):

§14-202.10. *Definitions.* As used in this Article:

(1) "Adult bookstore" means a bookstore having as a preponderance of its publications books, magazines, and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas, as defined in this section.

(2) "Adult establishment" means an adult bookstore, adult motion picture theater, adult mini motion picutre theater, or a massage business as defined in this section.

(3) "Adult motion picture theater" means an enclosed building with a capacity of 50 or more persons used for presenting motion pictures, a preponderance of which are distinguished or characterized by an emphasis on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas, as defined in this section, for observation by patrons therein.

(4) "Adult mini motion picture theater" means an enclosed building with a capacity for

less than 50 persons used for presenting motion pictures, a preponderance of which are distinguished or characterized by an emphasis on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas, as defined in this section, for observation by patrons therein.

(5) "Massage" means the manipulation of body muscle or tissue by rubbing, stroking, kneading, or tapping, by hand or mechanical device.

(6) "Massage business" means any establishment or business wherein massage is practiced, including establishments commonly known as health clubs, physical culture studios, massage studios, or massage parlors.

(7) "Sexually oriented devices" means without limitation any artificial or simulated specified anatomical area or other device or paraphenalia that is designed in whole or part for specified sexual activities.

(8) "Specified anatomical areas" means:

a. Less than completely and opaquely covered: (i) human genitals, pubic region, (ii) buttock, or (iii) female breast below a point immediately above the top of the areola; or
b. Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

(9) "Specified sexual activities" means:

a. Human genitals in a state of sexual stimulation or arousal;
b. Acts of human masturbation, sexual intercourse or sodomy; or
c. Fondling or other erotic touchings of human genitals, pubic regions, buttocks or female breasts.

§14-202.11. *Restrictions as to adult establishments.* No building, premises, structure, or other facility that contains any adult establishment shall contain any other kind of adult establishment. No building, premises, structure or other facility in which sexually oriented devices are sold, distributed, exhibited, or contained shall contain any adult establishement.

§14-202.12. *Violations; penalties.* Any person who violates G.S. 14-202.11 shall be guilty of a misdemeanor and shall be imprisoned for a term not to exceed three months or fined an amount not to exceed three hundred dollars ($300.00), or both, in the discretion of the court. Any person who has been previously convicted of a violation of G.S. 14-202.11, upon conviction for a second or subsequent violation of G.S. 14-202.11, shall be guilty of a misdemeanor and shall be imprisoned for a term not to exceed six months or fined an amount not to exceed five hundred dollars ($500.00), or both, in the discretion of the court.

STATEMENT OF THE CASE

Respondents do not believe that a complete counter-statement of the case would materially assist the Court in determining whether to grant certiorari. However, Petitioners' statement that the Eastern District "found as a fact that the bill's sponsor had heralded the bill as one which would raise the overhead of adult bookstores and drive them out of business . . ." (Pet. 10) stands in need of correction. Although Judge Dupree did admit the affidavits of two newspaper reporters who contended that Representative Morgan had made such remarks, he also admitted an affidavit from Representative Morgan himself which said:

> My intention in sponsoring House Bill 961 was to require the separation of: (1) the sale of sexually explicit books; (2) exhibition of sexually explicit movies; and (3) sale of sexual devices, so as to prevent the operation of sex supermarkets in North Carolina. It seemed to me that if these three enterprises were required to operate in different buildings, the immoral atmosphere and unsanitary conditions described in the health inspector's letter[1] would be less likely to occur.

---

[1]The letter referred to in Representative Morgan's affidavit had been written by a local health inspector to Senator I. Beverly Lake, Jr.:

> Dear Senator Lake:
>
> Pursuant to a report disclosing unspeakable and revolting activity at one of Raleigh's so-called adult book shops I had an inspection made by our two top-ranking sanitarians—on June 16, 1977.

Customers would be less likely to loiter and congregate for extended periods of time if the

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They visited five such establishments. At each they saw the usual array of pornographic publications. They found also cubicles or small booths where patrons enter, deposit a quarter and view assorted salacious films. Certain of the male customers masturbate under the resulting stimulation, ejaculating upon the floor and the walls. The volume of semen was so considerable by mid-afternoon as to be trickling down the wall to the floor. Customers went to and fro, oblivious to others present and seemingly not repelled by these degenerate surroundings.

Each of the five places checked has such cubicles and film projecting equipment. These numbered from twelve to sixteen.

Though only male customers were seen on this occasion, females are also afforded similar attention. Dildos of every description were available for sale, for use on the premises or for removal therefrom.

Used condoms littered the floors. The use therefor can only be speculated upon.

When questioned about the mess, the operators generally observed that it didn't do much good to clean up; 'Twas soon all to do over again. 'One with dubious wit or with exquisit drollery observed that the State should indeed license these places to 'clean em up.'

Hoping this report will serve alike your purpose and the commonweal, I am

Ever so sincerely,
Millard B. Bethel, M.D., M.P.H.
Director

functions were separated. My bill was intended to prevent sexual activity on the premises without significantly curtailing the sale and exhibition of sexually explicit books, sexually explicit movies and devices.

Judge Dupree made no finding as to which affidavit was correct. (App. 67-68).

ARGUMENTS

I.

THE NORTH CAROLINA STATUTES AT ISSUE DO NOT SUPPRESS FREEDOM OF SPEECH.

Much of the Petition for Certiorari is predicated upon the mistaken contention that N.C.G.S. § 14-202.10 *et seq.* suppresses freedom of speech. In assessing this claim, it must be remembered that, like the Plaintiffs in YOUNG v. AMERICAN MINI-THEATRES, 427 U.S. 50 (1976), "(t)here is no suggestion that [any of the Plaintiffs] is anything more than a commercial purveyor. They do not profess to convey their own personal messages through the [books they sell or] movies they show, so that the only communication involved is that contained in the [books and] movies themselves." *Id.* at 78 (n.2) (concurring opinion of Powell, J.). Consequently, the only First Amendment claim Petitioners can make is the effect of the statute on the dissemination of the materials. In fact, the statute in no way restricts what a consenting adult may read, view or

purchase. So far as this statute is concerned a store may sell (and a customer may purchase) the most hard core of pornographic books. Indeed, under North Carolina law, a person may only be prosecuted for disseminating an obscene film or book to an adult after a prior adversary proceeding in which a judge declared the film or book obscene. In sum, North Carolina has gone to great lengths to ensure that the viewing and reading habits of its citizenry are properly respected.

Much of Petitioners' objection to the statute seems to be that it does not go far enough towards eradicating the evils described in Dr. Bethel's letter, (n. 1 *supra*). But surely Judge Phillips' observation for the Fourth Circuit is the telling answer to that objection.

> Though the particular method chosen by North Carolina may not prove to be effective in eliminating the undesirable spin-off conditions, we cannot say that legislative action is rendered irrational by its choice of a less efficacious and less powerful approach than the Constitution might permit. (A-30)

Restraint is the hallmark of this statute. Rather than allowing any of its citizens to be deprived of either a single book or movie, the legislature enacted an extremely narrow statute to deal with the problem. The statute impinges far less upon First Amendment values than a large number of statutes sustained by this Court.

In YOUNG v. AMERICAN MINI-THEATRES, *supra*, for example, one could not open an adult movie theatre or bookstore within a thousand feet of another regulated use. The statute at bar permits one to open such an establishment anywhere except in the same building. Under this statute, if five adult establishments were on the same block, a sixth could open tomorrow. In Detroit, if even two were within a thousand feet, a third could not open. Under North Carolina law, a store owner is the master of his own destiny. He may sell all the dirty books or show all the dirty movies he desires. He simply cannot do both in the same building. In Detroit, on the other hand, one person's pool hall can make another's bookstore unlawful. Thus, the statute at bar intrudes upon First Amendment values far less than the YOUNG zoning ordinance upheld by this Court.

Similarly, statutes, ordinances, or regulations forbidding a door to door magazine salesman from knocking on a homeowner's door without prior permission [BREARD v. ALEXANDRIA, 341 U.S. 622 (1951)], totally prohibiting political advertising in public transit vehicles [LEHMAN v. SHAKER HEIGHTS, 418 U.S. 298 (1974)], absolutely precluding prime time use of the airwaves to broadcast a presumptively nonobscene monologue entitled "Filthy Words" [F.C.C. v. PACIFICA FOUNDATION, 438 U.S. 726 (1978)], and punishing a political dissenter for burning his draft card [UNITED STATES v. O'BRIEN, 391 U.S. 367 (1968)] have been upheld.

As the Fourth Circuit unanimously held, the less intrusive statute at bar should also be upheld.

II.

THE STATUTE IS PRECISELY TAILORED TO AN IMPORTANT STATE INTEREST.

In PARIS ADULT THEATRES v. SLATON, the Court described anti-obscenity laws as preserving certain basic societal values: "These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly the public safety itself." 413 U.S. 49, 58 (1973). The statute at bar addresses these problems more precisely than the typical obscenity statute which turns on such refinements as whether (1) the appeal to the prurient interest is predominant (obscene) or merely substantial (nonobscene), (2) sex is described in a patently offensive manner (obscene) as opposed to an ordinarily offensive manner (nonobscene), or (3) the material has serious artistic value (nonobscene) rather than artistic value which does not quite reach the level of being serious (obscene).

The legislature, after hearing evidence of the degenerate conditions in sex supermarkets, was determined to improve the quality of life and the tone of commerce in the adult shops. The statute which resulted is well calculated towards these ends.

The Petition for Certiorari posits that "(m)ost normal people enjoy looking at sex books and reading sex fantasies, which is why abnormal people have to spend so much time and money suppressing them . . ."

(Pet. 21, *quoting* from JOY OF SEX). Rather than spending time or money suppressing books, the statute creates a more wholesome atmosphere in places where such books can be purchased. Surely, the normal person does not enjoy slipping on semen when he or she attempts to purchase his or her sexually explicit book.

The presence of health laws which operate after the fact to punish violators is no solution. The problem is the unwholesomeness of the atmosphere which helps create the degenerate conditions in the first place. Surely, nobody would contend that street lights should not be placed on a dark street corner where several rapes have occurred simply because rapists can be punished. For both the book store and the street corner, an ounce of prevention is worth a pound of cure.

Even more to the point is CALIFORNIA v. LARUE, 409 U.S. 109 (1972) which upheld a California alcoholic regulation that precluded certain nonobscene sexually explicit entertainment from being presented where alcohol was served. The rationale of that regulation, like the statute at bar, was that two individually acceptable items (sexually explicit entertainment and alcohol in LARUE - sexually explicit books and sexually explicit movies here) are not acceptable when combined because the sum of their deleterious effects is greater than their component parts.

Although LARUE did allude to the Twenty-First Amendment, it seems clear that that Amendment would not have saved the statute had it been violative of

the First Amendment. [*Cf.* WISCONSIN v. CONSTANTINEAU, 400 U.S. 433 (1971), holding that the Twenty-First Amendment could not prevail over procedural due process in regard to the State's listing those individuals who are unfit to purchase liquor.] Rather, the Court held that "the critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments which it licenses to sell liquor by the drink." 409 U.S. at 118.

Once it is recognized that N.C.G.S. § 14-202.10 *et. seq.* are important regulations which do not suppress free speech and are precisely tailored to improving the quality of life and the tone of commerce in adult book stores and movie theatres, much of the Petition for Certiorari falls of its own weight.

III.

THE STATUTE IS NOT UNCONSTITUTIONALLY VAGUE.

Petitioners contend that the term "building, premises, structure, or other facility" is unconstitutionally vague. They raise the spectre of one store owner's being convicted under the statute for operating a bookstore in a high rise building or shopping mall because another store was conducting a different type of adult establishment. However, none of Petitioners claim to operate under such a cloud. Rather, each Petitioner, so far as the record shows, is the

only adult establishment in the building in which he operates. Consequently, under the majority (Stevens, Burger, White, Rehnquist, and Powell) opinion in YOUNG v. AMERICAN MINI-THEATRES, *supra,* this issue is not properly before the Court.

Petitioners also express concern about the vagueness of " 'preponderance' of books 'distinguished or characterized by an emphasis' on matter 'depicting, describing or relating to' certain sexual activity." (Pet. 39). Essentially, they are bemoaning the fact that they cannot be sure that their 49% sexually explicit books will not turn out to be 51%, thereby combining with their sexually explicit movies to render them a forbidden sex supermarket. This is nothing more than the familiar complaint of one who intentionally treads on the very edge of permissible conduct and complains because he might fall on the wrong side. *Cf.* NASH v. UNITED STATES, 229 U.S. 373, 377 (1913). Petitioner may avoid this problem by not treading so close to the line. They could dispense only adult books or only adult movies at any given location. So long as they choose to dispense substantial quantities of both, they of course risk becoming a sex supermarket and being punished accordingly.

The vagueness complaint at bar is very different from a bona fide First Amendment vagueness claim. The nub of a bona fide complaint is that a vague statute necessarily deters more than it forbids, and that which it deters is protected by the Constitution. For example, WINTERS v. NEW YORK, 333 U.S. 507 (1948) invalidated the standard "so massed as to become vehicles for

inciting violent and depraved crime" as the test for whether a magazine could be sold, *Id* at 513. The standard was so imprecise that its presence would deter the dissemination of constitutionally protected material.

In the case at bar, the statutory standard might cause a prudent adult mini-theatre owner to sell only 20% sexually explicit books or, perhaps, sell his sexually explicit books at a different location, thereby eliminating the sex supermarket atmosphere entirely. Since there is no constitutional right to run a sex supermarket at all, (see Arguments I and II, *supra.), the* fact that the statute may deter such supermarkets more than it forbids them does not aid Petitioners' vagueness argument.

CONCLUSION

For the reasons presented in Argument III, Respondents contend that the vagueness argument is insubstantial, basically unimportant, and not worthy of this Court's time. On this issue certiorari should be denied.

The certiorari worthiness of the First Amendment issue[2] is a closer question. In favor of denying the writ is

[2]Respondents agree with Petitioners that the equal protection issue is "(c)losely related to the First Amendment problems presented by the legislation at issue . . . ." (Pet. 36). Consequently, this Response has been couched in First Amendment terms. It is Respondents' position that First Amendment equal protection cases such as *Young v. American Mini-Theatres, supra* or *Police Department v. Mosley,* 408 U.S. 92 (1972) are essentially First Amendment cases and should be so analyzed.

Absent the First Amendment considerations in this case, any equal protection claim would be frivolous. *Cf. City of New Orleans v. Dukes,* 427 U.S. 297 (1976); *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974).

the fact that the unanimous Fourth Circuit opinion was unquestionably a correct statement of the law. (See Arguments I and II, *supra.)* Furthermore, there is neither nor is there likely to be a split among the lower courts, since, so far as Respondents know, North Carolina is the only state in the Union which has enacted a statute prohibiting sex supermarkets.

On the other hand, both the North Carolina statute and the Fourt Circuit opinion are models of the dispersal (as contrasted with the suppression) approach to the regulation of adult establishments. Thus, granting certiorari to affirm Judge Phillips' excellent opinion is likely to have a salutory effect upon encouraging such Constitutional Legislation. The question, then, is whether the need to convey this message to the nation is sufficiently important to grant certiorari in light of the correctness of the decision below and the overall caseload of this Court. On this question, Respondents take no position.

Respectfully submitted

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CERTIFICATE OF SERVICE

This is to certify that three (3) true and correct copies of the foregoing Response to Petition for Certiorari has been served upon the following by depositing three (3) copies of the same in the United States Mail, postage prepaid, addressed to:

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This the 13th day of May, 1980.

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